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AND

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stand security for the actual amount advanced, and interest at £5 per cent. On the 11th December, 1894, Monroe, J., delivered judgment, and by his order declared that the deeds should be set aside and should stand as security for advances only, and interest at £5 per cent., and after a reference to the Examiner to take the account of the amount due to the defendant on foot of the advances with interest, the Court ordered that within one month from the date of the order confirming the Examiner's report, the amount thereby found due should be paid by the plaintiff to the defendant, and, in the event of such amount not being paid as directed, the plaintiff's bill should be dismissed with costs. And on payment of the amount found due, the Court directed the defendant to hand over to the plaintiff all the deeds and documents so found void, and the Court directed each party to abide his own costs (1).

From that decision the defendant appealed, and on the 25th June, 1895, the Court of Appeal delivered judgment, refusing the appeal. The decree made by the Court of Appeal was that the order and judgment of Monroe, J., dated respectively the 3rd and 11th December, 1894, be affirmed, and that the appeals therefrom do stand dismissed; but if, in any of the proceedings under the judgment dated the 11th December, 1894, it should be held that Joyce was to rank for any part of his demand *puisne* to the English creditors represented by the plaintiff, it was ordered that the defendant Joyce should be at liberty to impeach the securities of the English creditors, and, if necessary, to use the plaintiff's name for that purpose on giving indemnity; and it was further ordered that the costs of the appeals herein, together with the costs of the motion of the 18th April, be paid by the appellant Thomas Joyce.

The motion of the 18th April was to admit further evidence on the appeal.

The plaintiff's costs of appeal were taxed at £253 14s. 4d. The defendant objected to four items in the bill of costs, amounting altogether to £81 7s. 6d., on the ground that they were briefs of pleadings and evidence which had been used in the Court of first instance, and could not be charged for again. The Taxing

(1) See report [1896] 1 I. R. 442.

Officer overruled the objections, and, being required to state his reasons, stated that the documents, the briefs of which were objected to, were all specifically relied upon in the notices of appeal and the notice of motion for leave to use further evidence; that it was admitted that these documents were all used on the hearing of the appeal, and that it was proper and necessary that counsel should have briefs of them, and that he saw no reason why a party to an action should not be allowed the fees fixed by the schedule of fees for briefs or copies of documents which were necessary and were utilised for a proceeding for which he gets his costs, when he has not been allowed or paid for such briefs or copies in any previous proceeding.

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The defendant applied to Madden, J., sitting for the Land Judge, on the 21st February, 1896, to disallow these items in the bill of costs, but the motion was refused, and from that order the defendant appealed.

J. O. Wylie, Q.C., in support of the appeal:—

The effect of the ruling of the Taxing Officer is practically to overrule the decision of the Court below. It is admitted that if the plaintiff had got his general costs of suit in the Court below, he would be in the same position as to these four items as he is with this ruling. But these are not costs of appeal, properly so called, at all. The reason given by the Taxing Officer is that these costs had not been already allowed or paid for in any previous proceeding. That is wrong, because the plaintiff was deprived of his costs in the Court below.

Houston, Q.C., for the plaintiff:—

This is a case of first impression. If these costs had been given in the Court below and paid for, we could not be paid twice over. It was necessary for the purposes of the appeal that counsel should have had these documents in their briefs. The other side have bought our work. If it was necessary that these documents should be used on the appeal, they should be paid for, if not paid for previously: *Oppenshaw v. Whitehead* (1); *The Mammoth* (2).

(1) 9 Ex. 384.

(2) 9 P. D. 126.

C A S E S

DETERMINED BY

THE CHANCERY AND PROBATE DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE COURT OF BANKRUPTCY IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1897.

KEVANS *v.* JOYCE (1).

Appeal.
1896.

Practice—Costs—Appeal—Judgment of Court of first instance directing each party to abide his own costs—Costs of briefs at trial, also used in Court of Appeal.

April 22.

In an action to set aside certain documents for fraud the plaintiff obtained a decree, but each party was to abide his own costs. The defendant appealed, and the appeal was dismissed with costs. The respondent's bill of costs included four items, which were the costs of briefs of pleadings and evidence used in the Court of first instance. The appellant, in his notice of appeal, stated that he intended to rely on the documents contained in these briefs. The Taxing Officer allowed these items as costs of the appeal, and, on application to Madden, J. (sitting for the Land Judge), the ruling of the Taxing Officer was affirmed:—

Held (reversing the decision of Madden, J.), that the cost of these briefs should not be allowed as costs of the appeal.

THE action was brought to set aside two mortgages, dated the 18th June, 1889, and 17th October, 1889, and a conveyance, dated the 3rd April, 1891, and for a declaration that they should

(1) Before FITZGIBBON, BARRY, and WALKER, L.JJ.

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stand security for the actual amount advanced, and interest at £5 per cent. On the 11th December, 1894, Monroe, J., delivered judgment, and by his order declared that the deeds should be set aside and should stand as security for advances only, and interest at £5 per cent., and after a reference to the Examiner to take the account of the amount due to the defendant on foot of the advances with interest, the Court ordered that within one month from the date of the order confirming the Examiner's report, the amount thereby found due should be paid by the plaintiff to the defendant, and, in the event of such amount not being paid as directed, the plaintiff's bill should be dismissed with costs. And on payment of the amount found due, the Court directed the defendant to hand over to the plaintiff all the deeds and documents so found void, and the Court directed each party to abide his own costs (1).

From that decision the defendant appealed, and on the 25th June, 1895, the Court of Appeal delivered judgment, refusing the appeal. The decree made by the Court of Appeal was that the order and judgment of Monroe, J., dated respectively the 3rd and 11th December, 1894, be affirmed, and that the appeals therefrom do stand dismissed; but if, in any of the proceedings under the judgment dated the 11th December, 1894, it should be held that Joyce was to rank for any part of his demand *paisne* to the English creditors represented by the plaintiff, it was ordered that the defendant Joyce should be at liberty to impeach the securities of the English creditors, and, if necessary, to use the plaintiff's name for that purpose on giving indemnity; and it was further ordered that the costs of the appeals herein, together with the costs of the motion of the 18th April, be paid by the appellant Thomas Joyce.

The motion of the 18th April was to admit further evidence on the appeal.

The plaintiff's costs of appeal were taxed at £253 14s. 4d. The defendant objected to four items in the bill of costs, amounting altogether to £81 7s. 6d., on the ground that they were briefs of pleadings and evidence which had been used in the Court of first instance, and could not be charged for again. The Taxing

(1) See report [1896] 1 I. R. 442.

Officer overruled the objections, and, being required to state his reasons, stated that the documents, the briefs of which were objected to, were all specifically relied upon in the notices of appeal and the notice of motion for leave to use further evidence; that it was admitted that these documents were all used on the hearing of the appeal, and that it was proper and necessary that counsel should have briefs of them, and that he saw no reason why a party to an action should not be allowed the fees fixed by the schedule of fees for briefs or copies of documents which were necessary and were utilised for a proceeding for which he gets his costs, when he has not been allowed or paid for such briefs or copies in any previous proceeding.

The defendant applied to Madden, J., sitting for the Land Judge, on the 21st February, 1896, to disallow these items in the bill of costs, but the motion was refused, and from that order the defendant appealed.

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KEVANS
v.
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J. O. Wylie, Q.C., in support of the appeal :—

The effect of the ruling of the Taxing Officer is practically to overrule the decision of the Court below. It is admitted that if the plaintiff had got his general costs of suit in the Court below, he would be in the same position as to these four items as he is with this ruling. But these are not costs of appeal, properly so called, at all. The reason given by the Taxing Officer is that these costs had not been already allowed or paid for in any previous proceeding. That is wrong, because the plaintiff was deprived of his costs in the Court below.

Houston, Q.C., for the plaintiff :—

This is a case of first impression. If these costs had been given in the Court below and paid for, we could not be paid twice over. It was necessary for the purposes of the appeal that counsel should have had these documents in their briefs. The other side have bought our work. If it was necessary that these documents should be used on the appeal, they should be paid for, if not paid for previously : *Oppenshaw v. Whitehead* (1); *The Mammoth* (2).

(1) 9 Ex. 384.

(2) 9 P. D. 126.

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FITZGIBBON, L. J. :—

The point involved in this appeal is important, if the practice is as stated. But the question comes now before this Court for the first time.

The action was serious and complicated, and the decree of Monroe, J., dated December 11, 1894, which declared the rights of the parties, though substantially against Joyce, after giving certain directions, ordered that each party should abide his own costs. The amount involved in the present appeal is £81, consisting entirely of the expense of documents briefed and used before Monroe, J., and formed part of the costs in the Court below covered by his order. The same documents were afterwards used in this Court, but no additional expense was incurred in briefing or copying them for the appeal. This Court, on June 25, 1895, affirmed the decision of Monroe, J., in these terms:—"It is ordered that the said order and the said judgment of Monroe, J., dated respectively the 3rd and the 11th December, 1894, be and the same are hereby affirmed, and that the appeals therefrom do stand dismissed."

The order of Monroe, J., that the plaintiff Kevans should abide his own costs, had been made upon the merits, and we affirmed it, agreeing that he ought not to get the costs of the action in the Court below; but though our order gave conditional relief to Joyce, in the way of enabling him, in certain events, to impeach the securities of the English creditors, and to use the name of Kevans for that purpose, it ordered that the costs of the appeal should be paid. In other words, we held that the appeal failed in substance, and ordered the unsuccessful appellant to pay the costs caused by the appeal. But the costs caused by the appeal were not intended by us to include any of the costs which had been incurred and disallowed in the Court below, before the appeal was taken. It is obvious that no costs already incurred and paid under an order of the Court below could afterwards be taxed or recovered back as costs of an appeal, where the order below was affirmed, nor could the appellant be allowed to charge the same costs over again, in order to get them as costs of an appeal upon which they were not incurred. But why? Not because the expense was not utilized or necessary for the appeal,

but because it had already been incurred in the Court below, and the work represented by the expense had been done, and the mode of defraying it had been decided, before the appeal was thought of. "Costs of the appeal" mean *additional* expenses first incurred in the litigation which is started by the notice of appeal—*extra* expense incurred by reason of the appeal being taken. The fallacy does not consist, as Madden, J., thought, in extending the order of Monroe, J., to the Court of Appeal, but in holding that costs, incurred and dealt with in the Court below, become costs of the appeal by not having been paid in the Court below. They are none the less dealt with by an order which directs the plaintiff to abide them, than if the defendant had been decreed to pay them, and had paid them. Yet, in that case it is plain that they could not be recovered over again, a second time, as costs of the appeal.

The decision of Madden, J., would give to an unmeritorious plaintiff, who had been deliberately deprived of some of his costs of suit by an order of the Court below, those very same costs, as costs of an appeal upon which the order depriving him of them was affirmed with costs.

Joyce's objection is well founded and must be allowed, with costs in the Court below of his notice of motion of February 21, 1896, and his costs of this appeal.

BARRY and WALKER, L.JJ., concurred.

Solicitor for the plaintiff: *J. D. Rosenthal*.

Solicitor for the defendant: *G. Byrne*.

R. D. M.

Appeal.
1896.

KEVANS
v.
JOYCE.

Fitz Gibbon,
L.J.

Appeal.
1896.

RE EARLY, A SOLICITOR (1).

Oct. 29. *Practice—Costs—Taxation—Party chargeable—Payment—Compromise of law suit—Bill of costs stopped out of fund in hands of a solicitor—12 & 13 Vict. c. 53, s. 3.*

A suit having been instituted in the County Court to establish the will of M. by C. the executor, the widow and daughter of the deceased opposed, with the result that a compromise was effected, by which certain legacies were abated, and the residue of the assets, after payment of the costs of both parties, was to be divided between the widow and daughter. E., the solicitor for the executor, furnished an account to H., the solicitor for the widow, in which he claimed three bills of costs, including one for £52 for untaxed miscellaneous costs. The widow objected, and, on the suggestion of H., E. moderated his bill by deducting £5, and sent a cheque to the widow for her share, after deducting the costs. She again objected, and after some correspondence, within twelve months of the delivery of the bill, moved for an order for taxation:—

Held (reversing the decision of Chatterton, V.-C.), that the widow, as “the person liable to pay,” was entitled, under 12 & 13 Viet. c. 53, s. 3, to have the costs taxed.

THE appellants Mary Anne M’Caughey (senior) and Mary Anne M’Caughey (junior) were the widow and daughter of Patrick M’Caughey, late of Ballyscally, county of Tyrone, who died in the Omagh Lunatic Asylum on the 20th March, 1894. Letters of administration of the personal estate of the deceased were granted to Mary Anne M’Caughey (junior). Afterwards a will was propounded by one Patrick Campbell, the executor named in it, whose solicitor was William Early, and a probate suit brought to establish the will.

The entire assets amounted to £435, and by the will £250 was bequeathed to charities. There were also some other small legacies. The Probate suit was heard before the County Court Judge for Tyrone, and a compromise was arrived at by which it

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L. JJ.

was agreed that the charitable legacies should abate to £83 6s. 8d. (one-third of their amount), that the small legacies should be paid, and the residue of the assets, after payment of the costs of both parties, should be divided equally between the widow and daughter. In these proceedings E. V. Hamilton acted as solicitor for the administratrix, but the funds came to the hands of Early for distribution. Early furnished his accounts in Oct., 1895, to Hamilton, who sent them to the appellants. There were three bills of costs, £29 15s. 10d., the taxed costs of probate; £17 12s. 10d., costs in the lunacy; and £52 15s. 7d., a miscellaneous bill of costs. Mrs. M'Caughey complained that the last-named bill was too large. Early offered to Hamilton to have them taxed or referred to any solicitor Mrs. M'Caughey might name, and the latter wrote to Hamilton suggesting T. C. Houston, of Belfast; but it did not appear that this request was communicated to Early, who moderated his claim by deducting £5. He then proceeded to distribute the fund; but on receiving the cheque for her share Mrs. M'Caughey objected, and after some correspondence a requisition to tax the miscellaneous bill of costs was served on Early, who refused to comply with it. A motion to tax was served by Mrs. M'Caughey, but on the 6th July the Vice-Chancellor refused to make an order. Mrs. M'Caughey appealed.

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EARLY.

Megaw, for the appellants, was stopped by the Court.

Matheson, Q.C., and *Bird*, for Early, contended that the case did not come within section 3 of the Act of 1849, and that there was no case in which it had been held that a residuary legatee had a right to have the executor's costs taxed. They further contended that the appellant's solicitor had agreed to the bill on her behalf; that the bill had been paid, and could only be called in question if special circumstances were shown.

LORD ASHBOURNE, C. :—

This is a small and interesting case, but no member of the Court has any doubt that it does come within the provision of the section of the Act referred to, and there is no reason why we should not apply those powers of taxation which have been con-

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Lord
Ashbourne, C.

ferred by it. The facts are short. A small estate became available for division under the trusts of a will. It was disputed by the widow and the daughter, they being dissatisfied with the way the money was left, and as a result a compromise was entered into which set free a substantial part of the property. This was not ordinary assets, but a small fund available in consequence of the compromise. The proceeds of the estate passed through the hands of Early, the solicitor for the executor, who paid himself, and his case is that as he was retained by the executor, and as the executor, who is the person nominally chargeable, has not disputed his action in the matter, no one else, even the person liable to pay, has a right to call it in question. But the widow and daughter say that a bill of miscellaneous costs has not been taxed, and the widow is the person out of whose money the costs must be paid. She has never been satisfied, and she is a person under the Act who has a vital interest in seeing the matter put right. It is really not material that the executor, who has nothing to do with the payment, is satisfied. I think it does not require more than the facts disclosed in this case to see that this is a case in which taxation cannot be refused on the application of the person liable to pay. We shall therefore allow the appeal, with costs.

FITZ GIBBON, L.J. :—

Upon the construction of 12 & 13 Vict. c. 53, s. 3, the “party chargeable” with a bill of costs is plainly contrasted with the “person liable to pay.” Primarily, the person who retains a solicitor is the party chargeable with his bill, and therefore section 3 must have been intended to cover the case where the money of someone who has not retained a solicitor is liable to defray his costs. Where the party chargeable is the client, section 3 is not required, and I am quite prepared to extend the protection of the section to everyone whose money is liable to pay costs. It certainly ought to extend to such a case as this, where the duty of properly administering a fund rests on the executor who retains the solicitor, but the beneficial ownership of the net residue is in another, who would be helpless, if not entitled to tax the costs claimed by the executor’s solicitor. Early in his letters recognised Mrs. M’Caughey as the person “to be satisfied,” though, no

doubt, he said that she had no right to object to his costs. I think she had a statutory right to taxation, and the real question is whether, before the solicitor paid himself, and sent her a cheque for the balance, anything had occurred to deprive her of that right. Hamilton said he was satisfied, but thought that the claim should be moderated by £5. But the moment his client heard of the deduction, she at once repeated her original objection. I am quite unable to say that the transaction with Hamilton, in which each of the two solicitors expressed himself as satisfied with the amount demanded by the other, deprives the party whose money was to pay them both of her right to tax the costs.

The Vice-Chancellor's order must be discharged and an order for taxation must be made in the terms of the statute. But in determining "the event of the taxation," for the purpose of ascertaining who is to pay the costs of taxation, the £5 already deducted must be taken into account.

BARRY and WALKER, L.JJ., concurred.

Solicitor for the appellant: *T. C. Houston.*

Solicitor for the respondent: *The respondent in person.*

R. D. M.

ROSE v. ROSE.

(1895. No. 838.)

Will—Construction—Codicil—Estate tail or estate for life.

A testator, who was possessed of four estates, Rathbane, Ballyclough, Keave, and Lisdeen, by his will dated the 2nd September, 1860, devised Rathbane to his grand-nephew R. for life, and after his death to his first and other sons in tail male, with remainder to his nephew H. O. for life, and after his death to his first and other sons in tail male, with remainder to his brother J. R. for life, and after his death to his son H. T. for life, and after his death to his first and other sons in tail male, with remainder to J. F. (the second son of H. O.) for life, and after his death to his first and other sons in tail male, and with remainder to the use of every other son and sons of J. R. in tail male, with remainder to the testator's right heirs for ever.

Ballyclough the testator devised to H. O. for life, and after his death to his first and other sons in tail male, with remainder to R. for life, and after his

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L.J.

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1896.

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June 18.

M. R. death to his first and other sons in tail male, with remainder to J. R. for life,
 1896. and after his death to H. T. (son of J. R.) for life, with remainder to his first

ROSE and other sons in tail male, with remainder to J. F. (second son of J. R.) for
v. life, with remainder to his first and other sons in tail male; and for default
ROSE. of such issue, to the use of every other son of J. R. in tail male, with remainder to the testator's right heirs for ever.

Keave and Lisdeen the testator devised to J. R. for life, and after his death to H. T. for life, with remainder to his first and other sons in tail male, with remainder to J. F. for life, with remainder to his first and other sons in tail male; and in default of such issue to the use of every other son of J. R. in tail male; and for default of such issue then, as to Keave, to R. for life, and after his death to his first and other sons in tail male, with remainder to H. O. for life, with remainder to his first and other sons in tail male; and for default of such issue to the testator's right heirs for ever. As to Lisdeen, after the limitations aforesaid, the testator devised that estate to H. O. for life, with remainder to his first and other sons in tail male; and in default of such issue to R. for life, with remainder to his first and other sons in tail male, with remainder to the testator's right heirs.

The testator bequeathed pecuniary legacies to his nieces and two small annuities to servants, and appointed J. R., R., and H. O. residuary legatees and devisees, and J. R. and H. O. executors.

After the date of the will H. O. had a son born, H. O. (junior), and the testator made a codicil to his will dated the 20th February, 1867, by which he revoked the devise of Lisdeen to J. R., and devised that estate, together with Clongeheen and Moyarwood, to H. O. for life, with remainder to H. O. (jun.) for life, and his sons successively in tail male, with remainder to the second and other sons of H. O. in tail male; and in default of such issue to the use of R. for life, with remainder to his first and other sons in tail male; and in default of such issue to the use of H. O. in fee. The testator left his brother J. R. £1000, and left the residue of his property to H. O. and R. equally, as tenants in common, and appointed H. O. and R. executors of his will and codicil.

The testator made a second codicil to his will, dated the 29th May, 1874, by which, after reciting that H. O. had died since the execution of his will and first codicil, and that he was desirous that his grand-nephews, R. and H. O. (junior), the latter on his attaining twenty-one years, should be his executors and residuary legatees, he proceeded as follows:—"Now, therefore, I do hereby appoint the said R. and H. O. my executors and residuary legatees, in place of my nephew H. O., deceased, as aforesaid. I devise, direct, and declare that all lands, hereditaments, and premises which my grand-nephew, the said H. O., shall take at my death, or be entitled to under any will or codicil made by me, shall be held by him, and to his use in tail male only. And I do hereby declare that my said will and the first codicil thereto shall be construed and take effect throughout as if the names of my said grand-nephews, the said R. and H. O., had been inserted in my said will and first codicil thereto instead

of the said name of the said H. O. deceased. And in all other respects I do confirm my said will and first codicil thereto":—

Held, by the Master of the Rolls, and by FitzGibbon and Barry, L.JJ. (affirming his decision), *dissentiente* Sir Peter O'Brien, L.C.J., that H. O. (junior) took an estate tail in the lands of Ballyclough and Lisdeen.

M. R.
1896.

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v.
ROSE.

THE testator, Henry Rose, was seized of the following estates, all of which were held in fee or fee-farm :—

1. Rathbane, in the county of Limerick, the rental of which was about £570 a-year.
2. Ballyclough, in the county of Limerick, the rental of which was about £480 a-year.
3. Keave, in the county of Galway, worth about £150 a-year.
4. Lisdeen, in the county of Clare, worth about £350 a-year.
5. Ballyea, worth about £60 a-year.

The testator had not any children, but he had three brothers, Richard, Simon, and James, and the relations of the devisees in the will to the testator will appear from the following table :—

1. Henry. (the testator.) died 1875.	2. Richard. (predeceased testator.)	3. Simon. (died 1851.)	4. James. (died 1868.)
	Richard. (predeceased testator.)	Henry Ormsby. (died 1870.)	Henry T. James F.
	Robert de Ros Rose. (the plaintiff.)	Henry Ormsby (jun.).	

By his will, dated 2nd September, 1860, Henry Rose devised and bequeathed all his property to his nephew Henry Ormsby Rose, and his brother James Rose, and their heirs, executors, administrators, and assigns, upon trust as to his estate called Rathbane, Drumroe, to the use and behoof of his grand-nephew Robert de Ros Rose for life, with remainder to his first and other sons in tail male, with remainder to his nephew Henry Ormsby Rose for life, with remainder to his first and other sons in tail male, with remainder to his brother James Rose for life, with remainder to his son Henry T. Rose for life, with remainder to his first and other sons in tail male, with remainder to James F. Rose (other son of James Rose) for life, with remainder to his first and other sons in tail male, with remainder to every other son of James Rose in tail male, with remainder to the right heirs of the testator.

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As to the Ballyclough estate, the testator devised it to Henry Ormsby Rose for life, with remainder to his first and other sons in tail male, with remainder to Robert de Ros Rose for life, with remainder to his first and other sons in tail male, with remainder to James Rose for life, with remainder to Henry T. Rose for life, with remainder to the first and every other son of Henry T. Rose in tail male, with remainder to James F. Rose for life, with remainder to the first and every other son of the said James F. Rose, in tail male, with remainder to the use of every other son or sons of James Rose in tail male, with remainder to the right heirs of the testator.

As to the estate of Keave and Lisdeen, the testator devised them to James Rose for life, with remainder to Henry T. Rose for life, subject to an annuity of £50 a-year, for the benefit of the said James F. Rose, with remainder to his first and other sons in tail male, with remainder to James F. Rose for life, with remainder to his first and other sons in tail male, with remainder to every other son of James Rose, in tail male. And for default of such issue, then as to the lands of Keave to Robert de Ros Rose for life, with remainder to his first and other sons in tail male, with remainder to Henry Ormsby Rose for life, with remainder to the first and every other son of Henry Ormsby Rose in tail male, and in default of such issue, then to the testator's right heirs.

As to Lisdeen, the testator devised the same from and after the limitations aforesaid as to the same, to the use and behoof of Henry Ormsby Rose for life, with remainder to his first and other sons in tail male, with remainder to the use of Robert de Ros Rose for life, with remainder to his first and every other son in tail male, and for default of such issue of any of such son and sons, then to the testator's right heirs for ever.

The testator bequeathed several pecuniary legacies, and two annuities of £10 a-year to a herdsman, John Ryan, and £6 a-year to Mrs. Boland, to be paid in equal shares by Robert de Ros Rose, and Henry Ormsby Rose, out of the properties devised to them.

The testator appointed James Rose, and Robert de Ros Rose, and Henry Ormsby Rose, residuary legatees and devisees, and James Rose, and Henry Ormsby Rose, executors of his will.

The testator made a first codicil to his will, dated the 20th

February, 1867, and thereby revoked the devise of Lisdeen to his brother James, with remainder to his sons, and he devised Lisdeen, together with Clongeheen, and also Moyarwood, or Greenhills, in the county of Galway, to his nephew Henry Ormsby Rose for life, with remainder to his son Henry Rose for life, and his sons successively in tail male, with remainder to the second and every other son of testator's said nephew Henry Ormsby Rose in tail male, with remainder to the use of his grand-nephew Robert de Ros Rose for life, with remainder to his first and other sons in tail male, and in default of such issue to the use of Henry Ormsby Rose, his heirs and assigns for ever. He bequeathed to his brother James Rose £1000, to be paid out of his personal property, and the testator devised and bequeathed the rest of his property real and personal, to his nephew Henry Ormsby Rose, and his grand-nephew Robert de Ros Rose equally, share and share alike, as tenants in common, and to their respective heirs, executors, administrators, and assigns, for ever, and he appointed Henry Ormsby Rose, and Robert de Ros Rose on his attaining the age of twenty-one, executors of his will.

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Henry Ormsby Rose (the testator's nephew) died in 1874, and the testator made a second codicil to his will, dated the 29th May, 1874, in words and figures following :—

“Whereas by my said codicil I have appointed my late nephew Henry Ormsby Rose to be one of the executors to my said will and codicil. And whereas the said Henry Ormsby Rose having died since the execution thereof, I am desirous that my grand-nephews Robert de Ros Rose and Henry Ormsby Rose (the latter on his attaining twenty-one years) shall be my executors and residuary legatees. Now, therefore, I do hereby appoint the said Robert de Ros Rose and Henry Ormsby Rose my executors and residuary legatees in the place of my nephew Henry Ormsby Rose, deceased, as aforesaid. I devise, direct, and declare, that all lands, hereditaments, and premises which my grand-nephew the said Henry Ormsby Rose shall take at my death, or be entitled to under any will or codicil made by me, shall be held by him, and to his use in tail male only, and I do hereby declare that my said will, and the first codicil thereto shall be construed, and take effect throughout, as if the names of my said grand-

M. R. nephews the said Robert de Ros Rose, and Henry Ormsby Rose,
 1896. had been inserted in my said will and first codicil thereto, instead
 ROSE of the said name of the said Henry Ormsby Rose, deceased, and
v. in all other respects I do confirm my said will and first codicil
 ROSE. thereto."

Henry Rose the testator died on the 13th April, 1875, and probate of the will was granted on the 13th May, 1875, to Robert de Ros Rose the plaintiff, power being reserved to make a like grant to Henry Ormsby Rose, the other executor, on his attaining twenty-one.

Henry Ormsby Rose (junior), became of age on the 27th July, 1885, and went into possession of—(a) Ballyclough; (b) Lisdeen, Clongeheen, Moyarwood, or Greenhills; and (c) one moiety of Ballyea.

On the 24th October, 1887, Henry Ormsby Rose (junior), executed a disentailing deed by which he barred the entail in all the lands devised to him under the will of the testator. By indenture dated also on the 24th October, 1887, made between Henry Ormsby Rose (junior) of the first part, Emily Rose, his wife, of the second part, and Robert Hunt and John Julian, of the third part, Henry Ormsby Rose conveyed to Hunt and Julian Ballyclough, Lisdeen, Clongeheen, Moyarwood, or Greenhills, and one moiety of Ballyea, upon trust to the use of Henry Ormsby Rose for life, and after his death, upon trust, that Emily Rose should receive £300 per annum as jointure, and subject thereto upon trust for their children as they or the survivors of them should appoint, and subject thereto to their first and other sons in tail male, and in default of such issue to their daughters equally. The deed further provided that in case there should be no person in whom the said lands should absolutely vest under the preceding trusts and limitations thereof, then, that the same should be held in trust to the use of Alicia Maria Rose and Mary Rose (sisters of the said Henry Ormsby Rose (junior)), and their heirs equally as tenants in common.

John Junan died upon the 5th January, 1893, and by indenture, dated the 10th July, 1893, James Crozier was appointed trustee of the settlement of the 24th October, 1887. Robert Hunt died in 1895, and by indenture dated the 21st March, 1895,

William L. Hunt was appointed a trustee of the said settlement.

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Henry Ormsby Rose (junior) died on the 17th July, 1895, without having had any issue, leaving his wife Emily Rose, and Alicia Maria Rose and Mary Rose him surviving. Upon his death, Emily Rose entered into receipt of the rentcharge of £300 a-year, and Alicia Maria Rose and Mary Rose entered into possession of the rents of the lands comprised in the disentailing deed and deed of re-settlement. This action was brought by Robert de Ros Rose for a declaration that Henry Ormsby Rose (junior), was entitled to a life estate only in the said lands, and that on his death without issue the plaintiff became entitled to them as tenant for life.

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Ronan, Q.C., O'Connor, Q.C., and H. D. Connor, for the plaintiffs.

Serjeant Campbell, Q.C., Piers White, Q.C., and F. Fleming, Q.C., for the defendants.

THE MASTER OF THE ROLLS:—

Jan. 31.

I have received every assistance from counsel as to the construction to be placed upon this extraordinary codicil.

Henry Rose, the testator, had three brothers, one living at the time of his death, the other two deceased but leaving children. The testator's will, which is set out in full in the Statement of Claim, was made on the 2nd September, 1860.

He leaves all his property, real and personal, to his nephew, Henry Ormsby Rose and his brother James Rose, upon the uses and trusts following. As to his estate called Rathbane, and his estates called Rhuta, Clyduff, and Lisnagry, to the use of the plaintiff Robert de Ros Rose, son of his nephew Richard Rose, deceased, for life, with remainders over, with which devise this action is not concerned; next as to his house and demesne of Ballyclough and his estates called Killonan and Peafield, to the use of his nephew, the said Henry Ormsby Rose for life, and from and after the determination of that estate to his trustees and their heirs to preserve contingent remainders, and after the death of the said Henry Ormsby Rose, to the use of the first and other sons of the said Henry Ormsby Rose, successively, in tail male, and in default of such issue male to the plaintiff Robert de Ros

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Rose for life, with remainder to his first and other sons, successively, in tail male with remainders over.

The testator then leaves two estates, called Keave and Lisdeen, to the use of his brother James Rose for life, with remainders over which are not now material, and the ultimate limitation in the case of each of the devises I have mentioned is to the testator's right heirs.

He next gives certain pecuniary legacies to his nieces, and to his grand niece, Mary Rose, and gives certain small annuities to servants, which annuities are to be paid by Robert de Ros Rose and Henry Ormsby Rose out of the properties which the testator had in the first instance devised to them. He appoints his brother James Rose, and Robert de Ros Rose and Henry Ormsby Rose, residuary legatees and devisees, and James Rose and Henry Ormsby Rose his executors.

The will itself is well enough drawn, and there is nothing to suggest a doubt as to its construction. When he came to make the first codicil to his will, seven years after, namely, 20th February, 1867, his brother James was still alive, but he had changed his mind as to him. He, accordingly, by this codicil, revokes the devise of his fee simple estate in the lands of Lisdeen to his brother James, and devises the said lands of Lisdeen, together with the lands of Clongeheen and Moyarwood unto, and to the use of his nephew Henry Ormsby Rose for his life, without impeachment of waste, and after his decease, with remainder to the use of his son Henry Rose (as he is there called, his full name being Henry Ormsby Rose) for life, and his sons, successively in tail male, and in default of such issue remainder to the use of the second, and every other son of his said nephew Henry Ormsby Rose, according to seniority in tail male, remainder to the use of his grand-nephew, Robert de Ros Rose, son of his late nephew Richard Rose, for his life without impeachment of waste, and after his decease to the use of his first and other sons in tail male, and in default of such issue to the use of the said Henry Ormsby Rose, his heirs and assigns for ever. He leaves £1000 to his brother James Rose, to be paid out of his personal property; and as to the rest residue and remainder of any property real, personal, or freehold that he may die possessed of or entitled to and not disposed of, he

leaves the same unto and to the use of his said nephew Henry Ormsby Rose and his said grand-nephew Robert de Ros Rose equally share and share alike as tenants in common and not as joint tenants, and to their respective heirs, executors, administrators, and assigns, for ever, and he appoints his said nephew Henry Rose and his grand-nephew Robert de Ros Rose on his attaining the age of twenty-one years, executors of his said will and codicil.

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After the lapse of another seven years, namely on 20th September, 1874, the testator made a second codicil to his will, which is the one which gives rise to this litigation. The testator did not die till more than a year after the execution of this codicil, and yet it is strange that he was satisfied to leave his affairs in such a state as that in which they were left by this extraordinary document. It is the work of some one who did not know or care to inquire accurately as to what he was doing. It was probably prepared by some presumptuous and ignorant person. As it stands it is full of stupid blunders. Can I say that there is anything in it so clear that the intention of the testator can be gathered from it? I think as matter of conjecture, that possibly the testator may have had no intention except to provide for the event which had happened, namely the death of his nephew, Henry Ormsby Rose, and to place his son Henry Ormsby Rose in the same position as his father. If I had power to re-write this codicil, it is possible that I might arrive at the wishes of the testator in some such rough way as that. But I can only take the language he has used and read what he has expressed in words by the light of the general intention to be derived from a perusal of the will and codicils. *Abbott v. Middleton* (1) is one of the strongest cases to be found in the books as an authority for the proposition that the Court has power to supply words in a will to make sense of what would otherwise be nonsense, where the context not only shows that words have been omitted, but enables the Court to say with certainty what those words must be. It is to be observed, however, that it is a stronger thing to strike out words actually used than to supply obvious omissions. Giving the fullest effect, however, to the principle involved in that decision, which should not be resorted to

(1) 7 H. L. Cas. 68.

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except in a clear case, I come to consider the words of this second codicil. It commences with a statement that it is a second codicil to his will and to the codicil of 20th February, 1867; it then recites that by that codicil, the testator had appointed his late nephew Henry Ormsby Rose to be one of the executors to his said will and codicil, and that the said Henry Ormsby Rose having died since the execution thereof he is desirous that his grand-nephews Robert de Ros Rose and Henry Ormsby Rose (the latter on attaining twenty-one years) shall be his executors and residuary legatees. Robert de Ros Rose had already been appointed a residuary legatee under the will, and executor as well as residuary legatee and devisee under the first codicil. It is to be noticed that he does not use the expression "residuary devisee" in this second codicil, but only "residuary legatee." In the will he used the words "residuary legatees *and devisees*" and he does the same thing in effect in the first codicil, which I have already read, in which he specially refers to real property and uses the word "heirs." The codicil then proceeds:—"Now, therefore, I do hereby appoint the said Robert de Ros Rose and Henry Ormsby Rose my executors and residuary legatees in the place of my nephew Henry Ormsby Rose deceased as aforesaid." It has been assumed in the argument that residuary legatee here includes residuary devisee. If it were not so, and if the testator used the words "residuary legatee" in the narrower sense, it might possibly account for the way in which he goes on to deal with his property in this codicil. But I shall assume that it means devisee as well. Now come the words which give rise to the difficulty:—"I devise, direct and declare that all lands, hereditaments, and premises, which my grand-nephew the said Henry Ormsby Rose shall take at my death or be entitled to, under any will or codicil made by me, shall be held by him and to his use *in tail male only*." What did the person who drew that clause mean by it? The words are "under *any* will or codicil." The direction is not that the residuary estate given by the will and codicil is to be held by the residuary devisee as tenant in tail. If that had been meant it would have been very easy to say so, but at the same time, if that had been the intention, that is—if the testator had definitely intended it to apply to the residuary estate and nothing else, it would have been an

intention without any colour of reason, for the object of a residuary devise is to capture everything not disposed of. If the testator had other estates which would have passed under a residuary devise it would be contrary to common sense to suppose that he intended to give the residuary devisee an estate tail only in these lands. Can I give it that interpretation? No doubt in any construction of the clause the residuary estate will be included in it; but the objection I have pointed out would not apply so forcibly to a gift which (perhaps by accident) might or would include the residue, as to one which would refer simply to residue and to that alone. In terms it is not so confined; the words used are "all lands" which "he shall take at my death, or be entitled to under any will or codicil." This is probably meant to include estates in reversion as well as estates in possession. Can it be confined to estates passing under the residuary clause? Then it is said that the use of the word "only" in reference to the will and first codicil shows that I should put a narrower construction on the clause, and hold that it means only lands held for some estate greater than an estate in tail male, cutting these down in fact, and so limit it to interests passing under the residuary devise. Am I to give such an interpretation to the word "only"? Now, under the will itself Henry Ormsby Rose, junior, would have taken no greater estate than an estate tail, except he came in under the limitation to testator's right heirs. Under the first codicil he would take an estate for life, and it is only under the residuary devise that he would take an estate in fee in any lands which passed thereunder. Does the word "only" necessarily imply that he was to get a less estate than that which had been given to him? Does it not plainly mean that whatever other estate he would have taken in any lands, whether an estate for life, in tail general, or in fee, he was to take in them an estate in tail male only, that is, an estate in tail male and no other estate?

Then comes the next clause:—"And I do hereby declare that my said will, and the first codicil thereto, shall be construed, and take effect throughout as if the names of my grand-nephews, the said Robert de Ros Rose and Henry Ormsby Rose, had been inserted in my said will and first codicil thereto, instead of the

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said name of the said Henry Ormsby Rose, deceased. What is the meaning of this clause? Reading it literally, it is abject nonsense, mere drivelling. Take up the will and read it, and there is not a single place in it in which the names of Robert de Ros Rose and Henry Ormsby Rose can be read instead of the name of Henry Ormsby Rose consistently with giving any meaning to the will. Take, for example, the residuary clause in the will, and make the correction directed here to be made, and you will have the words, "Robert de Ros Rose" occurring twice. Take the first codicil. There is more in it, perhaps, to suggest the argument advanced on behalf of the plaintiff. The residuary gift there is to two persons only, viz. to Henry Rose, *i.e.* Henry Ormsby Rose (senior) and Robert de Ros Rose. Possibly the intention of the testator may have been to substitute, in certain places the name of Henry Ormsby Rose, junior, for Henry Ormsby Rose, senior. If the whole will were altered by inserting the name of Henry Ormsby Rose, junior, in certain places, every thing that has been said on behalf of the plaintiff would be right. But the testator has not said that. He has said that names are to be substituted, not *a* name. Mr. Ronan says that this clause is explained by the preceding one—"Whereas . . . I am desirous that my grand-nephews, Robert de Ros Rose and Henry Ormsby Rose, shall be my executors and residuary legatees. I appoint Robert de Ros Rose and Henry Ormsby Rose executors and residuary legatees in the place of my nephew Henry Ormsby Rose, deceased." The blunder here, he says, consists in the omission of the words, "Robert de Ros Rose and"; though the meaning is plain. But you cannot insert these words in the clause in question. The principle in *Abbott v. Middleton* (1) affords no help here. To construe the words favourably to the plaintiff's contention, you must strike out words to which some meaning must be attached if the clause is to be treated as capable of sensible construction. If you carry out what the testator says is to be done, and put the two names in place of Henry Ormsby Rose, you make nonsense of the clause: or rather the testator has done that for you.

Mr. Ronan suggested that the words "Robert de Ros Rose" in

this clause should be struck out, and the name of the person who was intended to be substituted (namely, Henry Ormsby Rose) retained. It was contended that, as some violence must be done to the language, it was as competent to the Court to strike out a name as to add a name. But as I have said it is a totally different thing to strike out a name which a testator has written into his will, from adding words which it may be demonstrated from the will that the testator intended to have put in, but accidentally omitted to do so. The testator has said that the will and first codicil are to be read "throughout" as if the names of Robert de Ros Rose and Henry Ormsby Rose had been inserted therein. That must either receive its natural meaning or no meaning. It is to be observed that the two names occur together only three times in all in the will and first codicil, once in the residuary clause in the will, and twice in the first codicil, in the second instance Henry Ormsby Rose being called Henry Rose. The use of the word "throughout" would really only apply to those three places. Is that enough to make me alter the whole frame of the will? I have no power to do so. I am wholly unable to strike out the name of Robert de Ros Rose from this clause.

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What is the duty of the Court when part of a document is clear and part is so obscure that no rational meaning can be put upon it? Plainly to reject the latter. This is not the case of a second clause of a will being merely inconsistent with the first, in which case as a rule the second clause must prevail; nor is it a case of repugnancy. I must therefore give the natural and ordinary interpretation to the direction "that all lands which the said Henry Ormsby Rose shall take at my death, or be entitled to under any will and codicil made by me, shall be held by him in tail male only." The testator died in 1875, and Henry Ormsby Rose, junior, came of age in 1885, and went into possession of the rents and profits of the properties mentioned in paragraph 6 of the Statement of Claim. In 1887 he executed a disentailing deed, and married and re-settled the property. That of course did not bind the plaintiff until after the death of Henry Ormsby Rose, junior, which only took place in July, 1895, when he died without having had any issue, as on the plaintiff's construction of the will and codicil he was tenant for life at any rate. At the same time the dealings with the

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property show the construction put upon the will and codicil by Henry Ormsby Rose, junior. He has left a widow who is entitled to a jointure of £300 a-year under the deed re-settling the estates.

The question which has come before me for determination could not have been raised till now. The decision which I have arrived at in favour of the defendants will leave the inheritance with the possession, and confirms the view taken of the defendants' rights by their advisers.

The action, therefore, in my opinion fails, and must be dismissed with costs.

W. L.

The plaintiff appealed (1).

Appeal.
May 7, 8, 11.
June 18.

Ronan, Q.C., and O'Connor, Q.C. (with them *H. D. Conner*), for the appellants:—

The question is—what is the meaning of the second codicil? We submit that it gave only a life estate in the lands to Henry Ormsby Rose (junior). In order to construe the second codicil it is necessary to consider the limitations of the will and first codicil. By the will the testator devised his property in strict settlement, so that an estate for life only was given to every object of the testator's bounty then *in esse*, and an estate in tail male after that. After the date of the will, Henry Ormsby Rose (junior) was born, and accordingly it became necessary to alter some of the dispositions in the will. The testator revoked the devise of Lisdeen in the will, and devised Lisdeen and Moyarwood to Henry Ormsby Rose (senior) for life, with remainder to Henry Ormsby Rose (junior) for life, with remainder in tail male. This again supported the general scheme of the will. After the execution of the first codicil, James Rose the testator's brother died, and Henry Ormsby Rose (senior) died in 1872. That necessitated another change as Henry Ormsby Rose (senior) was joint executor and joint residuary legatee and devisee with the plaintiff. So the second codicil was executed for the purpose of putting Henry Ormsby Rose (junior) in the place of his father.

(1) In the Court of Appeal, before SIR PETER O'BRIEN, L.C.J., and FITZGIBBON and BARRY, L.JJ.

The intention of the testator must be ascertained from the contents of the entire will: Jarman on Wills, 326; see the observations of Bacon, V.-C., in *Redfern's Case* (1), and of Lord Halsbury in *Jodrell v. Seale* (2), *Hill v. Crook* (3), and *Grey v. Pearson* (4). Where there is a manifest absurdity or incongruity as here, the Court will ascertain the main purpose of the will, and adopt a construction that will carry it out: *In re Northen's Estate* (5). In such cases an omission will be supplied by inference: *Mellor v. Daintree* (6), *Towns v. Wentworth* (7). The same rule has been followed in Ireland in *Wallace v. Seymour* (8) and in *Leader's Estate* (9), and a like rule has been applied to statutes which are not to be reduced to a nullity by the draftsman's unskillfulness or ignorance of law: *Salmon v. Duncombe* (10). Where a testator makes a codicil without professional assistance, his expressions are not to be construed technically if it is clear that he meant to use them in a different sense: *Read v. Backhouse* (11).

The second codicil must be divided into two parts: the first clause appoints Henry Ormsby Rose (junior) executor and residuary legatee along with the plaintiff, and the second clause deals with the lands. We contend that the second clause is descriptive only, and it only states in popular terms the testator's wish with respect to the lands. The terms of this clause are not conveying words: *Doe v. Walker* (12); *Re Champion* (13). In this clause "in tail male" must mean settled, and this view is confirmed by the use of the word "only." In the language of executory trusts "in tail" means settled: *Sealy v. Stawell* (14). The estate clause is ambiguous because it is contradictory of the clause immediately after, which gives only a life estate, and secondly on account of the word "only." Then the last clause in the second codicil provides that the will and first codicil shall be construed "throughout" as if the names of the plaintiff and Henry Ormsby Rose (junior) had been inserted in the will and first codicil.

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(1) 6 Ch. D. 133.

(2) 44 Ch. D. 590.

(3) L. R. 6 H. L. 265.

(4) 6 H. L. Cas. 61.

(5) 28 Ch. D. 153.

(6) 33 Ch. D. 198.

(7) 11 Moo. P. C. 526.

(8) I. R. 6 C. L. 343, 367.

(9) 17 L. R. I. 327.

(10) 11 App. Cas. 627.

(11) 2 R. & M. 546.

(12) 12 M. & W. 591.

(13) [1893] 1 Ch. D. 101.

(14) I. R. 9 Eq. 499, 507.

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Serjeant Campion, Q.C., and Piers White, Q.C. (with them Matheson, Q.C., F. Fleming, Q.C., Fetherstonhaugh, and Litton Falkiner), for the respondents:—

The estate clause in the second codicil is not ambiguous. If a testator in disposing of his property makes use of technical terms, the Court must give effect to the estate created according to the meaning of the technical terms. Here an estate tail was clearly given, and the Court cannot cut it down by the use of the word "only." In the context in which it is used, "only" means "and not otherwise." The Court cannot collect the intention of the testator by conjecture: *Doe v. Hicks* (1), *Grey v. Pearson* (2), *Abbott v. Middleton* (3). The testator must be taken to have intended what he has expressed. The argument of the appellant's counsel ignored the tenure clause altogether, and practically asked the Court to strike out the name of Robert de Ros Rose out of the last clause in the codicil. The last clause in the codicil is inapplicable to a specific estate, but the effect of the codicil is to enlarge into an estate tail the estate for life in Ballyclough and Lisdeen, and to reduce the estate in fee in Ballyea into an estate tail. The object of the testator was apparently uniformity.

J. Leech, for the trustees of the settlement of 24th October, 1887.

June 18.

SIR PETER O'BRIEN, L.C.J. :—

This is an appeal from a decision of the Master of the Rolls, and involves a question of very considerable difficulty. The plaintiff, Mr. Robert de Ros Rose, instituted this action, by which he sought a declaration that, on the death of his cousin, who is, by way of distinction, styled, in the pleadings, Henry Ormsby Rose, junior, he became, under the testamentary dispositions of his grand-uncle, the late Mr. Henry Rose, entitled to certain estates, consisting of various denominations, and which may be briefly described as the Ballyclough and Lisdeen estates.

The Master of the Rolls dismissed the action, with costs, and the plaintiff has appealed against his decision. The solution of

(1) 8 Bing. 475.

(2) 6 H. L. Cas. 61.

(3) 7 H. L. Cas. 68.

the controversy before us depends upon what we determine to be the true construction of the second codicil to the will of the late Mr. Henry Rose. No difficulty is presented by the will or first codicil; they are absolutely clear, drawn with technical accuracy and lawyer-like skill. It is the second codicil that creates the difficulty. This document is as singular a testamentary writing as ever came under the notice of any Court. The Master of the Rolls denounces it as the work of someone who did not know or care to inquire accurately as to what he was doing. He said that it was, probably, prepared by some presumptuous and ignorant person, and that as it stands it is full of blunders: such is the description by the Master of the Rolls of the document we have to interpret. For my own part I would not, were I at liberty to rest a conclusion on probability, conjecture, or speculation, have any moral doubt of what the testator intended by this very informal codicil, but the question remains—can I, having regard to the language used, be judicially convinced of what, if I were allowed to conjecture or speculate, I would most assuredly be morally satisfied? Before I read this perplexing codicil, I must refer to the will of the late Mr. Henry Rose and his first codicil thereto, in relation to, and in connection with, which this second codicil must be read. The second codicil, which gives rise to the controversy, purports to confirm the will and first codicil, save so far as altered by the second codicil, and the question before us is how far that alteration has been effected—what, in fact, is the extent of the change made in the testator's most carefully and elaborately prepared will and first codicil, by this most informal document? In the first instance I think it well to endeavour to ascertain the general scheme of the testamentary dispositions of the testator, as indicated in the will and first codicil, which were evidently drawn by counsel. The testator was possessed of several estates, comprising many denominations. I shall call them, for the sake of brevity—Rathbane, Ballyclough, Keave, Lisdeen, and Ballyea. The net annual value of these estates was, in round numbers, as follows:—Rathbane, £480; Ballyclough, £570; Keave, £150; Lisdeen, £350; Ballyea, £80.

By his will, which was dated, 2nd day of September, 1860, the testator devised Rathbane to the plaintiff Robert de Ros Rose,

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who was his grand-nephew, *for life*; then to the first and other sons of said Robert de Ros Rose, as tenants in tail male; remainder to Henry Ormsby Rose (nephew of deceased) *for life*; then to the first and other sons of said Henry Ormsby Rose, as tenants in tail male; remainder to James Rose (brother of deceased) *for life*; then to Henry T. Rose, son of the said James Rose, *for his life*; then to the first and other sons of the said Henry T. Rose, as tenants in tail male; remainder to James F. Rose, other son of the said James Rose, *for life*; then to the first and other sons of the said James F. Rose, as tenants in tail male; remainder to every other son of the said James Rose, as tenants in tail male; remainder to the right heirs of the said Henry Rose, deceased.

The estate of Ballyclough he devised as follows :—To the said Henry Ormsby Rose (nephew of deceased), *for life*; then to the first and other sons of the said Henry Ormsby Rose, as tenants in tail male; remainder to the plaintiff, the said Robert de Ros Rose (grand-nephew of deceased) *for life*; then to the first and other sons of the said Robert de Ros Rose, as tenants in tail male; remainder to the said James Rose (brother of the deceased) *for life*; then to the said Henry T. Rose *for life*; then to the first and other sons of said Henry T. Rose as tenants in tail male; remainder to the said James F. Rose *for life*; then to the first and other sons of James F. Rose as tenants in tail male; remainder to every other son of the said James Rose as tenants in tail male; remainder to the right heirs of the said Henry Rose, deceased.

The estates of Keave and Lisdeen he devised as follows :—To said James Rose (brother of deceased) *for life*; then to said Henry T. Rose *for life*; then to the first and other sons of the said Henry T. Rose as tenants in tail male; remainder to the said James F. Rose *for life*; then to the first and other sons of the said James F. Rose, as tenants in tail male; remainder to every other son of the said James Rose as tenants in tail male; with remainder, as to Keave only, to the said Robert de Ros Rose, the plaintiff, *for life*; then to the first and other sons of Robert de Ros Rose, as tenants in tail male; remainder to the said Henry Ormsby Rose *for life*; then to the first and other sons of the said Henry Ormsby Rose, as tenants in tail male; remainder to the right heirs of the said Henry Rose, deceased; with remainder, as

to Lisdeen only, to the said Henry Ormsby Rose *for life*; then to the first and other sons of the said Henry Ormsby Rose as tenants in tail male; remainder to the said Robert de Ros Rose, the plaintiff, *for life*; then to the first and other sons of the said Robert de Ros Rose, as tenants in tail male; remainder to the right heirs of the said Henry Rose, deceased.

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The foregoing dispositions exhausted all the lands which the testator had at the time of making his will, save and except the lands of Ballyea, worth only about £80 a-year, and this would pass under the residuary clause, by which his brother James Rose, and his grand-nephew the plaintiff, and his nephew Henry Ormsby Rose, senior, were appointed joint residuary legatees and devisees.

By the first codicil to his will, which was dated 20th February, 1867, the testator revoked the devise as to the lands of Lisdeen, which had by his will been devised in the first instance to his brother James, and devised them and the additional lands then lately acquired of Clongeheen, and Moyarwood, or Greenhills, all of which I will, for the sake of brevity, call Lisdeen, to the said Henry Ormsby Rose *for life*; then to Henry Rose (son of said Henry Ormsby Rose) *for life*; then to the sons of the said Henry Rose in tail male; remainder to every other son of the said Henry Ormsby Rose in tail male; remainder to the said Robert de Ros Rose, the plaintiff, *for life*; then to the first and other sons of the said Robert de Ros Rose in tail male; remainder to the said Henry Ormsby Rose and his heirs.

This limitation of the ultimate remainder to Henry Ormsby Rose, senior, exhaustively disposed of the estate of Lisdeen. The first codicil concluded as follows:—"I leave and bequeath unto my brother James Rose the sum of £1000, to be paid to him out of my personal property, and as to all the rest, residue and remainder of any property, real, personal, or freehold, that I may die possessed of or entitled unto, and not in the said will (nor hereinbefore disposed of), I leave, devise, and bequeath the same unto and to the use of my said nephew Henry Ormsby Rose, and my grand-nephew Robert de Ros Rose, equally, share and share alike, as tenants in common, and not as joint tenants, and to their respective heirs, executors, administrators, and assigns for ever, and I hereby constitute and appoint my said nephew Henry Rose,

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and my said grand-nephew Robert de Ros Rose on his attaining the age of twenty-one years, executors of said will, and of this codicil."

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This is the residuary clause apparently superseding the residuary clause in the will, and under it the estate of Ballyea, which was freehold, would vest in Henry Ormsby Rose, senior, and the plaintiff as tenants in common in fee. Now, looking back over the general map of the testator's dispositions, what do I see? I see that all his principal estates, Rathbane, Ballyclough, Keave, and Lisdeen, were by an elaborate series of cross limitations kept within, so to speak, the confines of the testator's family, wherever the testator found an object of his bounty in being, he limited to him in the first instance a life estate and no more. If we look at what I have called "the map" we shall see five life estates, whether immediately or in remainder, limited in Rathbane; we shall see the limitation of a like number of life estates as regards Ballyclough, and seven life estates as regards both Keave and Lisdeen, as taken together and separately. The only estate that he gave absolutely was the insignificant estate of Ballyea, the annual value of which was about £80, an estate which was so insignificant as to be left to the residuary devise, and was not dealt with specifically. What then was the general scheme of the will and first codicil? This, viz. to limit a life estate wherever there was an object of the testator's bounty in existence, and by a series of cross limitations to keep the several properties within the confines of the testator's family. The intention of the testator was to fetter the various estates so that they should not, so far as he could help it, pass, so to speak, the confines of the family.

I am quite aware that Henry Ormsby Rose, junior, was entitled under the will to an estate tail in remainder in the lands of Ballyclough at the time of the making of the first codicil, and that this was not altered by the first codicil; but there was no disposition made of Ballyclough by the first codicil. The testator was not then dealing with the Ballyclough estate. Whenever he was dealing with an estate, every taker who was in being was made tenant for life only; the estate which was conferred on him was a life estate at most. So emphatically was the scheme of disposition I have indicated observed that, when the first codicil was made, and

the devise in the will of the lands of Lisdeen revoked by it, there were two life estates limited in succession in these lands, namely, to Henry Ormsby Rose, senior, and to Henry Ormsby Rose, junior, the latter being only three years old at the time. By the will and first codicil, then, the estates with which they were conversant, save the insignificant estate of Ballyea, were put in practically strict settlement; no living person, if the testator died, would have had the power of divesting the estates from the line of disposition amongst the testator's relatives marked out by the will and first codicil respectively.

I cannot be too precise in pointing out the limitations of the estate of Lisdeen declared by the first codicil. Henry Ormsby Rose, senior, got the first life estate, with remainder to his son Henry Ormsby, junior, for life; with remainder to his first and other sons in tail; with remainder in default of such issue to the plaintiff Robert de Ros Rose for his life; with an ultimate remainder, in default of such issue, to Henry Ormsby Rose, senior, in fee. It is to be noted that this ultimate remainder in fee in the lands of Lisdeen was limited, after a life estate to the plaintiff Robert de Ros Rose, and a remainder in tail male, to his the plaintiff's sons. It was only on the failure of issue of Robert de Ros Rose that the other branch of the family, that is to say, the branch represented by Henry Ormsby Rose, senior, was to get the ultimate remainder in fee in Lisdeen.

It is also to be noted with respect to this first codicil that under the residuary clause in it Robert de Ros Rose and Henry Ormsby Rose, senior, took Ballyea, as tenants in common in fee, that is to say, that they had identical interests in what they took, namely the fee, as tenants in common.

The date of the first codicil was, as I have already stated, 20th February, 1867; between that and the date of the second codicil, namely the 29th May, 1874, Henry Ormsby Rose, senior, had died, and his son Henry Ormsby Rose, junior, had attained the age of about ten years. On the latter date, the 29th May, 1874, the testator made the second codicil, upon which the controversy before us arises. I shall read it. When I read it originally, I sympathised with the feelings of the Master of the Rolls, who denounced it as the work of some careless, ignorant,

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Appeal. and presumptuous person. But what is the meaning of this much
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What was the circumstance which led to its being made? The death, as the testator tells us, of Henry Ormsby Rose, senior. What was the object of the testator? Nothing more or less, I think, than to put the son in the place which the father left. This I would be readily satisfied of, if I were warranted in resting a conclusion on conjecture or speculation. But ought I to be judicially convinced from the language of the codicil that this was the intention of the testator? This is the question I have to answer. Before I apply myself to the different clauses of the document, I desire to refer to what some of the authorities have said upon the subject of the construction of wills. I know that the interpretation of one will can get little or no assistance from the language used in another, but nevertheless it is well to refer to some of the authorities in order that we may have in prominent relief before us the rules or canons which the Courts apply to the construction of wills. I may refer in the first instance to the rule of construction as laid down by Lord Wensleydale in *Abbott v. Middleton* (1). "It is now, I believe, universally admitted, that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended, or abridged, so as to avoid those consequences, but no farther. This rule in substance is laid down by Mr. Justice Burton in the case so frequently quoted of *Warburton v. Loveland*" (2). Such is the language of Lord Wensleydale in a well-known passage of his judgment, but whilst he reaffirms in this passage the rule which was supposed to be laid down in *Grey v. Pearson* (3), he is careful to add that "quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the

(1) 7 H. L. Cas. 68, at p. 114. (2) 1 Hud. & Br. 648. (3) 6 H. L. Cas. at p. 78.

instrument." It will be a question hereafter whether the sense of the clause in the second codicil, where the words "tail male" and "only" occur, is so plain and obvious that its construction should not be influenced by the context of the second codicil taken as a whole, and by the general scheme of the will and first codicil.

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I now turn to the rule, as laid down by Lord St. Leonards in the same case, at p. 95, where he says:—"Now, I agree with my noble and learned friend, that you are not to collect intention by conjecture. I wholly disclaim anything approaching to conjecture; I must have conviction, in order to bring my mind to a judicial determination in favour of an operation beyond the actual words used. Then, disclaiming conjecture, and founding upon words used, yet I may read those words according to the intention of the testator, which I find upon the face of the instrument. Therefore, I conceive that I may, first of all, look at the instrument throughout, in order to collect the intention."

This is the language of that great lawyer, Lord St. Leonards. Lord Chelmsford, the then Lord Chancellor, said:—"I entirely agree in the rule for the construction of wills laid down by my two noble and learned friends (Lords Cranworth and Wensleydale) in the case of *Grey v. Pearson* (1). This rule, however, is applicable only when the language of the will is clear and unambiguous. Where there is an uncertainty as to the meaning of any part of a will, the right of a Court of construction even to introduce words, in case of necessity, is clearly stated by Lord St. Leonards in the passage quoted from *Eden v. Wilson* (2). A power of this kind must, of course, be very cautiously exercised, to use the language of Mr. Jarman on Wills (2nd vol., 630), 'not merely on a conjectural hypothesis of a testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.'"

I have now quoted the rule of construction, as laid down by Lord Wensleydale, Lord St. Leonards, and Lord Chelmsford, in the well-known case of *Abbott v. Middleton* (3). They are all clear that if there be any uncertainty in any clause which may form the main subject of controversy, the entire instrument

(1) 6 H. L. Cas. 61.

(2) 4 H. L. Cas. 284.

(3) 7 H. L. Cas. 68.

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 1896. Some other well-known cases are referred to by Mr. Justice North
 ROSE when giving judgment in *Mellor v. Daintree* (1). He is reported
 v. to have said:—"I decline altogether to decide the case on any
 ROSE. mere conjecture of what the testator intended. It is unnecessary
 Sir P. O'Brien, for me to refer to any authorities other than two which have been
 L.C.J. mentioned. The first is *Sweeting v. Prideaux* (2), in which Vice-
 Chancellor Hall said:—"Several cases have been referred to, but
 the principle which is to guide me is to be found in the case of
Key v. Key (3), where Lord Justice Knight Bruce said:—"In
 common with all men, I must acknowledge there are many cases
 upon the construction of documents in which the spirit is strong
 enough to overcome the letter—cases in which it is impossible for
 a reasonable being, upon a careful perusal of an instrument, not
 to be satisfied from its contents that a literal, a strict, or an ordi-
 nary interpretation given to particular passages, would disappoint
 and defeat the intention with which the instrument, read as a
 whole, persuades and convinces him that it was framed. A man
 so convinced is authorized and bound to construe the writing
 accordingly." And the same principle is to be found in *Towns*
v. Wentworth (4), where Mr. Pemberton Leigh (afterwards Lord
 Kingsdown) said:—"When the main purpose and intentions of
 the testator are ascertained to the satisfaction of the Court, if par-
 ticular expressions are found in a will which are inconsistent with
 such intention, though not sufficient to control it, or which indi-
 cate an intention which the law will not permit to take effect, such
 expressions must be discarded or modified." "

This statement of the rule of construction by Vice-Chancellor Hall, Lord Justice Knight Bruce, and Lord Kingsdown, is valuable in showing that expressions may be discarded or modified when the main purpose and intention of the testator are ascertained to the satisfaction of the Court. What Vice-Chancellor Bacon said in giving judgment in *Redfern's Case* (5) is, in my opinion, very pertinent to the present case. He is reported at page 136 of the report to have said: "This is one of those difficult

(1) 33 Ch. D. 198, at p. 205.

(4) 11 Moo. P. C. 526.

(2) 2 Ch. D. 413.

(5) 6 Ch. D. 133.

(3) 4 D. M. & G. 73.

tasks which the construction of wills imposes on the Court, but there is a good deal of authority and guidance which enable the latter to discharge that duty with reasonable satisfaction. Now, no doubt, the mere letter of the will, or any other instrument, is not to be adhered to if a contrary signification can be suggested by the whole context of the instrument. The spirit is to prevail, and the letter is not to be allowed to kill. That I take to be a plain, clear canon of construction. There is the other rule which the Court always acts upon, namely, not to impute to the testator the intention of dying intestate." And at page 138 he says—"I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in his will, and treat that blunder as if it was the intention of the testator. I do not hesitate in the slightest degree therefore to adopt the rule which Vice-Chancellor Hall expressed in *Sweeting v. Prideaux*" (1).

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It is to be noted in this case that Vice-Chancellor Bacon imported a whole clause into the will under discussion, or rather, I should say, read the will as if it were in it, and said he was not to be deterred from so doing by the blunder of those who drew it. He also referred to the rule that we are not to impute to the testator an intention of dying intestate. There is another well-settled rule of construction to which I think it necessary to refer, that if there be a clear devise of an estate it cannot be revoked or altered except by a devise equally clear and unequivocal: see the judgment of Monahan, C.J., in *Wallace v. Seymour* (2), the judgment of the late Mr. Justice O'Brien in the same case in Ir. Rep. 6 C. L. 365, and the judgment of Lord Justice Kay in *Follett v. Pettman* (3).

Now, let me apply myself to the language of the second codicil. The testator in the first instance recites the previous appointment of executors, and, after stating that Henry Ormsby Rose, senior, had died, says he is desirous that the plaintiff and Henry Ormsby Rose, junior, shall be his executors and residuary legatees, he then uses this language—"Now, therefore, I do

(1) 2 Ch. D. 413.

(2) Ir. R. 6 C. L. 343.

(3) 23 Ch. D. 337.

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Mr. Ronan insists that any sentence in the codicil, using practically the same language, must have the same meaning wherever it occurs; that the testator, to use the language of Lord Cairns in *Hill v. Crook* (1), and of Lord Halsbury in *Jodrell's Case* (2), has supplied the dictionary, which is to determine his meaning. However, it is clear that there cannot be here a literal application of the language used; the words "Robert de Ros Rose and" must be rejected. The next clause of the codicil is the one, which is the main source of the controversy; it runs as follows:—"I devise, direct, and declare, that all lands, hereditaments, and premises, which my grand-nephew, the said Henry Ormsby Rose, shall take at my death, or be entitled to under any will or codicil made by me, shall be held by him, and to his use in tail male only."

Having read it, I ask is not the primary impression produced by the mere reading of it, that the clause is one of curtailment, and not of enlargement? Most assuredly, read as a whole, it does not convey the sense or idea of enlargement; what is aimed at is restriction, the fettering and not the freeing of the estates. The whole sentence must be read together, including in it the word "only"; we cannot in this sentence segregate words. It runs as a single indivisible sentence, and I am clear, as I said, that the sentence as a whole imports restriction and not enlargement. The word "only" in that sentence means in my judgment "at most," "no more than."

But how does this clause operate according to the contention

(1) L. R. 6 H. L. 265.

(2) 44 Ch. D. 590.

of the respondents' counsel? To enlarge into an estate in tail male in possession the life estate which the testator had so carefully created by the first codicil in Lisdeen, and to do this in antagonism to the general tenor and scheme of the will and first codicil, which aimed at what was practically strict settlement. This construction enabled Henry Ormsby Rose, junior, to dispose absolutely of the property, though the first codicil gave Henry Ormsby Rose, senior and junior, respectively, but a life estate, as I have already pointed out, and gave the former the ultimate remainder in fee in Lisdeen, only in default of issue of the plaintiff. The plaintiff got a life estate, and his sons estates tail before the remainder in fee to Henry Ormsby Rose, senior; but by this construction of the second codicil, not only was Henry Ormsby Rose, junior, more favoured than he was in the first codicil, but the plaintiff and his sons, who had an estate in the lands under the provisions of the first codicil, were practically excluded by the power which a tenant in tail in possession possesses.

But as to those lands of Lisdeen, Mr. Ronan contended that the respondents' contention was opposed to the well settled rule of construction, to which I have already referred, that if there be a clear and unequivocal devise of an estate, such as there was of a life estate in Lisdeen by the first codicil, this cannot be revoked or altered, except by a devise equally clear and unequivocal, and that this at least could not be found in the second codicil. I agree with him; I think this clause of the second codicil is at least doubtful and uncertain. I say, "at least doubtful and uncertain," for in my judgment the word "only" means "at most," "no more than." This construction would allow to the words "tail male" what is contended to be their inflexible import as words of art. If the sentence was, strictly speaking, one of "curtailment," it had an appropriate subject-matter to curtail, namely the estate in fee in Ballyea, if Ballyea was included in this third clause (that is to say, the clause where the words "tail male" occur) as contended for by the defendants' counsel. The word "only" has in my opinion the meaning I have attached to it; but assuming that it may have two meanings, that it may mean "at most," "no more than," or that it may mean "nothing else than," the meaning,

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 1896. be adopted. If there be ambiguity, the clear unequivocal devise
ROSE in the first codicil must stand. In any view then of this second
v. codicil the life estate in Lisdeen would not in my opinion be
ROSE. enlarged into an estate tail.
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But I shall now state generally my view of this second codicil taken as a whole. For the sake of brevity I shall call the much canvassed clause, where the words "tail male" occur, "the third clause," and I shall refer to the lands of Ballyclough and Lisdeen, which were practically in strict settlement by the will and first codicil, as the "entailed estates." In my opinion the small freehold estate of Ballyea was not included at all in the third clause. It was dealt with in the earlier part of the second codicil whereby Henry Ormsby Rose, junior, was appointed residuary legatee, and was intended to be left, and was in fact left, to the residuary clause, the words "residuary legatees" including, in my opinion, as I have already stated, "residuary devisees." The third clause was, in my opinion, notwithstanding the expression "all lands, hereditaments and premises, which my grand-nephew, the said Henry Ormsby Rose, shall take at my death," conversant solely with the "entailed" lands, and the expression "shall be held by him and to his use in tail male" means shall be held for an entailed estate, an estate in strict settlement in the manner indicated by the will and first codicil, the first taker taking but a life estate, and the name of the son Henry Ormsby Rose, junior, being substituted for that of the father Henry Ormsby Rose, senior, throughout the entire will and first codicil. If this be the true construction of this second codicil, the only alteration effected by the second codicil is to put the son in the place of the father, and thus preserve the general character of what I have called the map of the testator's testamentary dispositions. This is my general view of the effect of the second codicil, and I shall now proceed to give my reasons for holding this view. I shall commence with what I shall call "the substitution of names clause." It is as follows—"And I do hereby declare that my said will and first codicil thereto shall be construed and take effect throughout as if the name of my said grand-nephews Robert de Ros Rose and Henry Ormsby Rose had been inserted in my said will and first

codicil thereto, instead of the said name of the said Henry Ormsby Rose, deceased." What is the meaning of this clause? It uses the words "shall take effect," and—"be construed" "*throughout*."

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This, of course, cannot mean that wherever the name of Henry Ormsby Rose, senior, appeared throughout the will and first codicil, the names of both Robert de Ros Rose and Henry Ormsby Rose, junior, should be substituted. We all agree that this would be absurd; that this would make rank nonsense of the will and codicil. The same rule must be applied here as to the earlier part of the codicil, that is to say, the rejection of the name of Robert de Ros Rose and the substitution of the name of Henry Ormsby Rose, junior, only, for Henry Ormsby Rose, senior. The authorities which I have quoted warrant this process of rejection. But it is said that the substitution is to take place only where the name of Henry Ormsby Rose, senior, is found to be associated with the name of Robert de Ros Rose. This construction I cannot adopt. I cannot give the substitution of the one name for the other so limited an application, and for the following reasons: I refer in the first instance to the position in the second codicil of this clause; it is placed not after the first provision as to the substitution of Henry Ormsby Rose, junior, as executor and residuary legatee in the place of his father; it is placed after the third clause, and it is coupled with that clause by the copula "And." Again, the third clause sounds in recital of intention, that is, it is in my opinion of an executory character, and "the substitution of names clause" from its position and language appears to be an operative clause, working out all the directions and intentions declared by the previous clauses. Again, there is the use of the word "*throughout*"; and if you restrict the operation of the clause in the way suggested, you give it a most limited application, and deprive it of its effect in making the second codicil consistent with, and operative to work out, the general scheme of the testator's bounty; and if it be so limited it is introduced here for practically no purpose, and all the limitations as to Lisdeen in default of issue of the sons of Henry Ormsby Rose, junior, practically, by virtue of the power a tenant in tail possesses, drop out of the testator's scheme of disposition.

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It is said there is an appropriate subject-matter for this clause to operate upon by confining its application to the residuary clause in the first codicil, but really, so far as related to the residuary clause, the substitution of the name Henry Ormsby Rose, junior, for that of his father had been done by the earlier part of the second codicil, where he was appointed co-executor and co-residuary legatee, residuary legatee including, as I have already said, residuary devisee. There was nothing for this clause to operate upon if the defendants' contention be well founded, except indeed the provision towards the concluding portion of the will for the payment of two annuities of £10 to John Ryan, and £6 to the widow Boland. In relation to the payment of these annuities the names of Robert de Ros Rose and Henry Ormsby Rose are found to be associated; but I don't think it could with any semblance of plausibility be argued that "the substitution of names clause" was introduced with reference to this provision only. From the use of the word "*throughout*," and from the fact that the testator expressly confirms his will and first codicil, I think it is reasonably plain that he intended to preserve the general character of what I have called the map of his dispositions, but to make alterations "*throughout*" which would be consistent with that general character being preserved.

The general character of the map of the testator's dispositions were life estates to those in being, with remainder so as to keep the properties, specifically named, within the confines of the family, in the manner indicated in the will and first codicil, and it is quite a mistake, in my opinion, in judging of the scope and object, and general intention of the testator's scheme of dispositions, to regard one estate, or one set of estates only. The dispositions of all the specifically named estates should be considered, as there are cross limitations, making all these estates pass, in certain events, from one branch of the family to the other. I am of opinion, then, that the substitution of the name of Henry Ormsby Rose, junior, for that of his father takes place "*throughout*" the will and codicil, and not merely where the names of Robert de Ros Rose and Henry Ormsby Rose are found associated. I proceed now to consider what was included in the third clause of the second codicil, that is, the clause in which the expression, "tail male"

occurs. It was, in my opinion, intended to apply, and did apply only to the "entailed" estates. It did not, in my opinion, apply to Ballyea, the fee of which would pass to Robert de Ros Rose and Henry Ormsby Rose, senior, under the residuary clause in the first codicil, and the estate which was given to Henry Ormsby Rose, senior, in which passed to Henry Ormsby Rose, junior, by his appointment as residuary legatee (read as including residuary devisee) by the earlier part of the second codicil. There are several reasons which induce me to take this view. Firstly, Ballyea was never in the will or first codicil associated with what I have called the entailed estates. It was separately dealt with, that is to say, by the residuary clause. It was never even named. Besides, so far as the second codicil is concerned, it was already dealt with by the earlier portion thereof, the appointment of Henry Ormsby Rose, junior, as residuary legatee (legatee including devisee) being sufficient to put the son in the place of the father, so far as related to the residuary clause. Still, further, the expression "to be held in tail male" points exclusively to the "entailed" estates, and not to the unnamed estate of Ballyea, the fee of which passed under the residuary clause. Besides, including Ballyea in the third clause, would have this effect—it was also *ex concessis* in the residuary clause, and yet, though in the residuary clause, the entire estate would not pass, as *ex hypothesi*, an estate in tail male and nothing else could be taken, which would be inconsistent with the ordinary function of a residuary clause. There would, in fact, be a residue within a residue undisposed of. I am of opinion, then, that the words, "all lands, hereditaments, and premises which my grand-nephew, the said Henry Ormsby Rose shall take at my death," in the third clause, can reasonably mean all my entailed lands, entailed by the will and first codicil. But, secondly, I think, that the language of the third clause, to use a felicitous expression of Lord Hobhouse, when pronouncing the unanimous opinion of the Privy Council, in *Salmon v. Duncombe* (1), is not so "absolutely intractable," as not to be capable of being read so as to harmonise with the general intention of the testator's scheme of disposition. The words are, "shall take at

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(1) 11 App. Cas. 627.

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 1896. words as meaning, "take at my death *under*, or be entitled to under
ROSE any will or codicil," and I read the words, "any will or codicil,"
v. as any will or codicil heretofore made by me. The will and codicil
ROSE. theretofore made gave no estate in Ballyea to Henry Ormsby
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 L.C.J. the "entailed" estates exclusively. Of this, if I were to conjecture, I have no doubt whatever, for it would be in the last degree whimsical to have Ballyea included in a residuary devise, and not the whole estate pass, and to be so included that two persons, to whom the residuary clause in the first codicil purports to give equal interests as tenants in common, are to take estates of a different character, and an intestacy created as to the remainder in fee after the estate tail to Henry Ormsby Rose, junior. But, as I said, I don't think the words necessarily involve this whimsical and grotesque result. The clause is confined to the "entailed" estates.

But it is said the words "in tail male" are rigid, inflexible, inexorable words of art. No doubt, Lord Esher in giving judgment in the case of *Bedson's Trusts* (1) said, "I agree with the late Master of the Rolls that the artificial rules which have been laid down for the construction of wills have been carried too far, and that a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents, and not according to such artificial rules. What I am saying does not apply to wills of real property, in which well known technical phrases as to realty are used, and where, therefore, such wills should be construed according to the established meaning of such words of art." But Lord Esher certainly did not intend to say that the ordinary sense of such words is not susceptible of modification, if a clear intention appears from the entire testamentary disposition not to use the words in question in their strict legal import. The rule in such cases is correctly stated in Hawkins on Wills:—"That technical words and expressions must be taken in their technical sense, unless a clear intention can be collected to use them in another sense, and that other sense can be ascer-

tained": see page 4 of Hawkins where the cases are collected. For recognition of this rule I would refer especially to the opinions expressed in the judgments in *Jesson v. Wright* (1); *Doe d. Winter v. Perratt* (2); *Doe v. Gallini* (3); and *Roddy v. Fitzgerald* (4). Some of the cases say that there should be "a clear intention," that the words were not used in their strict legal sense: other cases say there should be "a very clear intention" they were not so used. But what is "clear," a "very clear intention"? I quote Lord Halsbury to show that these expressions mean if the particular tribunal founding its decision upon the language of the entire instrument, such as it is, is satisfied as to the meaning of the testator, and I quote Lord Justice Bowen to show that they mean if the person interpreting can come to a distinct conclusion as to such meaning. In *Jodrell's Case* (5) Lord Halsbury said: "For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments, and to that extent it may be said that they are canons of construction. But the moment I depart from those general canons of construction applicable to all instruments, and I am overwhelmed with authorities about what particular Judges have thought about other particular instruments, and whether in this or that particular instrument the Judge has been sufficiently satisfied that such and such was the meaning of the testator, I confess myself to be in a hopeless state of confusion. In the first place, I do not know what mental thermometer there is to ascertain what exact degree of certainty is to be obtained. *If there is sufficient to establish the meaning, why is it sufficient? And what does that mean? It must mean sufficient in the mind of the particular tribunal that has to decide.* That there are particular phrases and particular sets of phrases to which the law would attach a particular meaning is true; and when unqualified and unexplained by anything else those words are found in

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(1) 2 Bligh, 1.

(2) 6 M. & G. 342.

(3) 5 B. & Ad. 640.

(4) 6 H. L. Cas. 877.

(5) 44 Ch. D. 590, at p. 605.

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an instrument, of course you must give to those words or to those phrases the meaning which the law has attached to them, and it would be unreasonable if you did not; because you must suppose, in the absence of any other explanation, that the person who has used those phrases, or used the particular word, has used the phrase or the word in the sense which has hitherto been attached to it by the law, and there is no reason to go out of what you might call the ordinary and *prima facie* meaning of such an expression."

Such is the language of Lord Halsbury, and it seems to me to be intended to apply to all testamentary instruments, no matter what the character of the subject-matter they are conversant with, be it personalty, or be it realty. To the same effect is the language of Lord Justice Bowen, at page 614 of the report of *Jodrell's Case* (1), he is reported to have said as follows:—"It seems to me that the law as laid down in *Hill v. Crook* (2) by Lord Cairns is the true law—and although I do not disguise from myself that many Judges, from Lord Eldon's time down to the present, Judges of the highest authority and of the greatest learning, have used language (so to speak) of warning, and language that amounts to more than Lord Cairns has said—have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a *necessary inference*, or a *very clear intention to that effect*—it seems to me that the only weight one can give to such language is to treat it not so much as a canon of construction as a counsel of caution to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a *distinct conclusion*. But I protest that, as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed." Such is the language of Lord Justice Bowen.

Now I am satisfied, and have arrived at a distinct conclusion, (others of course may think my satisfaction unwarrantable, and

(1) 44 Ch. D. 509.

(3) L. R. 6 H. L. 265, 285.

my conclusion the reverse of distinct) that the words "shall be held by him and to his use in tail male" mean shall be held by him for an entailed estate—for an estate in strict settlement in the manner indicated by the will and first codicil, the first taker taking but a life estate with remainders as indicated in the will and first codicil. This conclusion is impressed upon my mind by the fact that the third clause, if I may use the expression, sounds in curtailment—by the fact that, at least according to my opinion, Ballyea is not included in the third clause, and that therefore the only subject-matter in that clause to curtail is the estate tail given by the will in Ballyclough—by the general scheme of the testator's testamentary dispositions—by the fact that the "substitution of names clause" has, as appears to me, a general and not a limited application, that it substitutes amongst other places the name of the son for that of the father, wherever the latter had but a life estate—and finally by the fact that, if the third clause is to be construed as suggested by the defendants' counsel, fantastic results, or intestacy, would follow. Indeed, giving an estate tail in possession to a person borders, in my opinion, upon the whimsical. Of course whimsicality is a privilege of testators, but a construction which gets us out of the region of whimsicality should, if equally maintainable with an opposite construction, be adopted. I asked Serjeant Campion what was the object of the testator in giving estates tail in possession, a form of disposition that would be undone by an ordinary disentailing assurance. The learned Serjeant first said it was not for him to speculate, the words were there, and that was sufficient. A good answer if true; but at the same time one cannot help feeling uneasy as to the correctness of a construction, which involves a disposition for the existence of which the ingenuity of able counsel can suggest no reason. The learned Serjeant then consulted with his colleagues, and said that the object the testator had in view was uniformity. Uniformity! That is to say, for the sake of mere uniformity, he enlarged the life estate in Lisdeen into an estate tail, he brought Ballyea into association with the other estates, where it never was before, and did so to create an estate tail in it, thus creating for the sake of uniformity an unstable form of estate that could be altered, as I have said, by the

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execution of an ordinary disentailing deed. This is too fantastical. Yes, I admit uniformity, but not that kind of uniformity which would defeat the obvious intention of his testamentary dispositions, by putting it in the power of the first taker to annul various limitations of his most elaborately drawn will and first codicil. The uniformity aimed at was in my opinion the intelligible uniformity of giving the first taker but a life estate in all, what I have called, the "entailed" estates, and this was done by substituting the name of the son for that of the father throughout the will and first codicil, and in the language of the second codicil "construing" the will and first codicil, and allowing the will and first codicil to "take effect" as if the father had never been in existence, but as if the son originally got what the father got and no more.

This, I am satisfied, is what was intended by the second codicil. It was never contemplated by the testator by such an informal, perfunctory, document as this to make so serious an inroad as the defendants' counsel suggest into his most skilfully, and elaborately, prepared will and first codicil, which indeed he was careful expressly to confirm by this second codicil.

But I desire to point out some of the difficulties and results which would follow, if the contention on behalf of the defendants be well founded. I have glanced at them before. In *Jodrell's Case* (1), at page 608, of the report, Lord Halsbury is reported to have said—"Remembering that the will and codicil are to be read together, I really do not know in what way more than one of the provisions of this will could be given effect to." So say I also, with reference to the case before us. Suppose Henry Ormsby Rose, junior, died without barring the estate tail, what would be the result? Would his sons take in Lisdeen an estate tail by descent as the heirs of their father, or would they take the lands for an estate in tail male as purchasers under the first codicil? But what became of the ultimate remainder in fee in Lisdeen, which under the first codicil was limited to Henry Ormsby Rose, senior? Was there an intestacy as regards this? or did it pass as a lapsed devise under the residuary clause in the first codicil? If it did, would Robert de Ros Rose, in addition to his original

moiety of the residue, take a moiety in this remainder equally with Henry Ormsby Rose, junior? But *ex hypothesi* Henry Ormsby Rose, junior, could by virtue of the second codicil take an estate tail male and nothing more. Therefore if the respondents' argument be well founded, the result would be this, viz. the grotesque result of two persons who were made, as tenants in common, takers of equal interests by the residuary clause in the first codicil, taking, one an estate in fee-simple in a moiety of the remainder, and the other an estate tail in the other moiety, and there would be besides an intestacy as to the moiety out of which the estate tail was carved by the second codicil. And again, if the respondents' argument be well founded, there would be also an intestacy as to the remainder in fee in Ballyea; an estate tail and nothing more could be taken by Henry Ormsby Rose, junior, in Ballyea, and therefore there must be an intestacy as regards the remainder in fee in Ballyea.

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The ultimate remainder in fee in Keave is limited to the right heirs of Henry Rose. Suppose, by the death of the antecedent takers, that Henry Ormsby Rose, junior, came to be the heir, *ex hypothesi* he could not take the remainder in fee under the limitations—there would, in that case, also be an intestacy. Now, if my view of the construction of the second codicil be the true one, all these difficulties would disappear. The ultimate remainder in fee, in Lisdeen, would vest in Henry Ormsby Rose, junior—that is to say, the son would take the place of the father. Ballyea would vest in Robert de Ros Rose and Henry Ormsby Rose, junior, as tenants in common in fee, both having identical interests, such as was contemplated by the residuary clause in the first codicil. There would be no difficulty, or grotesque result, as to the ultimate remainder in Keave in the events which I have contemplated. The three instruments, that is to say, the will and first and second codicils, would be an intelligible, consistent, whole. The general map of the testator's testamentary dispositions would remain the same, that is to say, the ground-work would be the same; the only difference that would exist would be in the occupants, and this only in reference to the father and the son—the father, Henry Ormsby Rose, senior, being, as it were, eliminated, or rather treated as if he never was an object of the testator's

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bounty—the son's name being written where the father's was. Thus, the general intention of the testator's scheme of disposition would be carried into effect—grotesque result and intestacy avoided, and, the son an object of the testator's bounty in existence, when the codicils were executed, not given the power of alienating the entailed estates.

This is my view of this most difficult case. This second codicil is, indeed, a unique document, but, having satisfied myself of the intention of the testator from the language, such as it is, of all his testamentary writings taken together, I am not, in the words of Vice-Chancellor Bacon, to be deterred from giving effect to that intention by the blundering expressions of an attorney, or an attorney's clerk.

I am, accordingly, of opinion, that the judgment of the Master of the Rolls should be reversed, and the relief prayed for granted.

FITZ GIBBON, L.J. :—

In my opinion, the decision of the Master of the Rolls was right, and the action and appeal should be dismissed with costs.

I can derive little or no assistance from the authorities cited. The difficulties of the case are entirely caused by the peculiar language of the second codicil, which is unlike any other testamentary instrument which has been submitted to judicial interpretation. Under such circumstances, other cases can supply only general rules leading in different directions, only raising the question—Which of these rules is applicable to this case?—or furnish instances of the lengths to which Courts have gone in the endeavour to construe or give effect to the ambiguous, defective, incorrect, or even unintelligible, but different, language of other testators.

I proceed at once to the first duty of the Court, viz. to place myself, as far as possible, in possession of the information which the testator had when he wrote his will and codicils, and, applying that information to his language, to endeavour to find out how far it conveys a distinct meaning. So far as it does so, I have no jurisdiction to alter its terms, or to distort its effect.

At the date of his will, September 2, 1860, the testator had three freehold estates, each of considerable value. For brevity, I refer to these estates by the names of the leading denominations

only. They were :—(1), Rathbane, worth about £500 per annum; (2), Ballyclough, worth £570 per annum; and (3), Keave and Lisdeen, of which, as devised by the will, the annual value is not stated.

The testator had then living one brother James, who had two sons, Henry T. and James F. Rose. He also had one grand-nephew, then under age, Robert de Ros, the son of a deceased nephew, and a nephew, Henry Ormsby, who was the son of a deceased brother, and had not then any son. Under these circumstances, the testator gave the three estates to the three *stirpes* which were the objects of his bounty, substantially according to the same plan of strict settlement, but in different order. Though it has been already stated by the Lord Chief Justice, I must summarize the disposition made by the will and first codicil, because my judgment upon the second codicil rests on my understanding of the effect of the previous will and codicil, on which it was intended to operate. Rathbane he gave to Robert de Ros for life, with remainder to his sons successively in tail male; with remainder over to Henry Ormsby for life, with remainder to his sons successively in tail male, with remainder over to James for life; with remainder to Henry T. for life, with remainder to his sons successively in tail male; with remainder to James F. for life, with remainder to his sons successively in tail male; with remainder over to the other sons of James, and their issue successively in tail male; with ultimate remainder to the testator's own right heirs.

Ballyclough he devised in precisely the same way, except that he made Henry Ormsby and his male issue the first takers, and put Robert de Ros and his male issue into the second place.

Keave and Lisdeen he gave together, in the first instance, to James for life, with successive remainders to his sons and their issue male, as in the case of the other estates, but, in default of issue male of James, he divided this estate, and devised Keave to Robert de Ros for life, and to his issue in tail male, with like remainders to Henry Ormsby, and his issue male, and with ultimate remainder to the testator's own right heirs, so as in effect to add Keave to Rathbane, on failure of male issue of James, while he gave Henry Ormsby and his issue precedence in a similar disposition of Lisdeen, so as in effect to add it to Ballyclough on failure of male issue of James.

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He gave £5700 in legacies, and £16 per annum in annuities, to be paid in equal shares by Robert de Ros and Henry Ormsby "out of the properties, . . . in the first instance devised to them." He appointed James, Robert de Ros, and Henry Ormsby, "residuary legatees and devisees," and James and Henry Ormsby executors of his will.

As the question for our decision is as to the effect of the second codicil upon the will and first codicil, and as it confirms them both "in all other respects," except so far as it alters them, it is absolutely necessary to understand the effect of each instrument, and the will, so far as I have stated it, is quite clear.

Between the date of the will and that of the first codicil, the testator's nephew, Henry Ormsby, had a son born to him, Henry Ormsby, junior, whose rights are now in question.

In the meantime also, the testator appears to have acquired other and additional lands, namely, Clongeheen in Clare, and Moyarwood in Galway, which he added to Lisdeen, and which, with Lisdeen, were worth £350 per annum; and he also had acquired certain lands of Ballyea, worth £82 per annum, of which he has made no express disposition, and which, therefore, pass as residuary realty. He made his first codicil on February 20, 1867. It recited the devise of Lisdeen to James, with remainder to his sons, and absolutely revoked that devise. But it did not revoke, or mention, the devise of Keave, which was, presumably, left to go to James and his sons and their issue, under the will. The testator then gave Lisdeen, with Clongeheen and Moyarwood, to the use of his nephew Henry Ormsby (the elder), for life, with remainder to the use of his son (then aged two and a-half years), Henry Ormsby the younger, under the name of "Henry Rose," for life, and his sons successively in tail male; with remainder to the use of the other sons of Henry Ormsby the elder, successively in tail male; with remainder to Robert de Ros (who was still under age) for life, with remainder to his first and other sons in tail male; and with ultimate remainder, in default of such issue, to the use of Henry Ormsby (the elder), his heirs and assigns for ever. This is the only instance in any of the documents of a devise of an ultimate remainder in fee to any one except the testator's own right heirs. By the same first codicil

the testator gave James Rose a legacy of £1000, to be paid out of his personal property, and he devised and bequeathed all the residue of his real and personal property to his nephew Henry Ormsby (the elder), and his grand-nephew Robert de Ros, share and share alike, as tenants in common, and to their respective heirs, executors, administrators, and assigns, for ever, and he appointed his nephew, Henry Ormsby, the elder, under the name of "Henry Rose," and his grand-nephew, Robert de Ros, on his attaining the age of twenty-one years, executors of his will and of that codicil.

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The result of this form of residuary devise is to be remembered, for it seems to me to displace the supposed objection to construe the subsequent residuary devise to Henry Ormsby Rose, junior, as a devise in tail. If either of the residuary devisees in common died in the testator's lifetime, his share would lapse, and go to the testator's right heirs. But I have already pointed out that it would only fall into the same hands to which the ultimate remainder in fee in Rathbane and Ballyclough had been already limited, and the only effect of limiting the residuary devise in tail to an infant, as Henry Ormsby, junior, was at the date of the second codicil, was to send the residuary limitations in the same direction, preferring the testator's own right heirs to the right heirs of the devisee, in the event of the death of the devisee, during infancy, or without enlarging his estate tail. I am wholly unable to see that such a result is "grotesque" or "whimsical." In fact, such a view of the effect of a residuary devise in tail can only, in my humble judgment, arise from a misapprehension of the unquestionable effect of the other provisions, and a misunderstanding of the dispositions of the expressly devised lands.

An argument, much pressed for the appellant, rested upon imputing to the testator, from the will and first codicil, a primary or general intention, which the Lord Chief Justice calls a "general scheme or term of the will," to tie up his property, as far as possible, in strict settlement; in other words, as Mr. Ronan put it—"to make a tenant for life whenever he could find one." This argument rests, in my opinion, upon no sufficient foundation of fact, and upon an argument from the particular instance to the general, contrary as well to logic as to the truth. It is true



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that he revoked the devise of Lisdeen to James and his sons, and when devising it, along with Clongeheen and Moyarwood, to Henry the elder, and his sons, he made Henry Ormsby, junior, tenant for life, as Henry T. and James F., the sons of James, had been under the will. But these were the only lands of which he made Henry Ormsby, junior, tenant for life, and all three denominations, taken together, were worth but £350 per annum. The disposition of these lands by the first codicil differs from that of every other denomination, both in this respect, and also in giving the ultimate remainder in fee to Henry Ormsby, senior, in place of the testator's own right heirs. Henry Ormsby, junior, remained tenant in tail male in remainder of all the other lands devised to him by the will.

The second codicil was executed on May 29, 1874. Henry Ormsby, junior, was then about ten years old, and Robert de Ros had attained his majority.

The testator's brother James died in 1868, and his nephew, Henry Ormsby, senior, died in 1870. Under these circumstances the second codicil was made, and it is vital to remember that at that date, under the will, if the testator died, Henry Ormsby, junior, would have been first and immediate tenant in tail male in possession of Ballyelough, worth £572 per annum; second tenant in tail in remainder, in default of male issue of Robert de Ros, in Rathbane, worth £500 per annum; and third tenant in tail male in remainder in Keave, in default of male issue of James and of Robert de Ros. As to each and every one of these three estates, the supposed "general intention" or "general scheme" was *not* carried out, though it might have been, by reducing Henry Ormsby, junior, to a tenancy for life by the first codicil, as was exceptionally done with regard to the comparatively small and unimportant estate of Lisdeen. No doubt, under the first codicil, he would have been immediate tenant for life in possession of Lisdeen, worth £350 per annum, and his father, if living, would have taken one moiety of Ballyea absolutely in fee-simple as residuary devisee.

The second codicil contains three clauses; the first is inaccurately expressed, but it carries its own correction on its face. The second, taken by itself, appears to me to be perfectly clear and plain—a fully expressed testamentary provision—in

technical language, apparently used effectively in its proper sense. The third, and the third alone, raises any difficulty, and the chief difficulty is to see whether, or how far, it affects the second. The Master of the Rolls approached the consideration of this second clause in a temper of "*liberrima indignatio*," which I shall endeavour to avoid lest it might disturb that unimpassioned attempt to discover the testator's meaning, from his words, which it is our duty to make. The Master of the Rolls says:—"This extraordinary document is the work of someone who did not know or care to inquire accurately as to what he was doing. It was probably prepared by some presumptuous and ignorant person. As it stands it is full of stupid blunders." Of the third clause he says:—"Reading it literally it is abject nonsense, mere drivelling." I am not prepared to say that this trenchant criticism is entirely justified, though the codicil is undoubtedly very inartificial and inaccurate.

We have seen the original, as we were entitled to do. It was prepared by a solicitor presumably from instructions; engrossed by his clerk, presumably from a draft; and witnessed by them both. It recites that the testator had appointed his late nephew Henry Ormsby to be one of the executors of his will and codicil, which it correctly refers to by date, and that Henry Ormsby having died, the testator is desirous that his grand-nephews Robert de Ros and Henry Ormsby (the younger), the latter on his attaining twenty-one years, shall be his "executors and residuary legatees." The first operative clause follows:—"Now, *therefore*, I do hereby appoint the said Robert de Ros Rose and Henry Ormsby Rose my executors and residuary legatees, in the place of my nephew Henry Ormsby Rose, deceased, as aforesaid." Robert de Ros was already a residuary legatee and devisee under the will, and also under the first codicil, which appointed him an executor, along with the deceased Henry Ormsby, senior. Therefore this clause is inaccurate in that it appoints two people to be executors and residuary legatees in place of one who is dead, but one of them already had that position. If we met this clause could we doubt its meaning?—"Whereas by my will I appointed *AB* and *CD* my executors and residuary legatees; and whereas *AB* is dead, now therefore I appoint *CD* and *EF* my executors and residuary

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legatees in the place of *A B* who has died as aforesaid." It requires a critical microscope to detect the grammatical flaw in this, but the effect and meaning are perfectly clear. The new pair takes the place of the old pair, but one of the two devisees is common to both pairs. In my opinion, a large part of the structure of the appellant's argument upon the third clause falls to the ground, if we observe that the same inaccuracy occurs again in that clause. When I come to it, I shall act on the principle, so well put in *Re Jodrell* (1), of using one part of the codicil as a "dictionary" to explain the other.

Upon the omission to describe the newly appointed executors and residuary legatees as also *devisees*, I will only observe that the repetition of the name of Robert de Ros Rose, and the express appointment of Robert de Ros and Henry Ormsby, junior, "*in the place of Henry Ormsby Rose, deceased,*" appear to me amply to show that both real and personal property were intended to pass under the residuary gift in the second codicil, as they expressly did both under the will and also under the first codicil.

The second clause is in terms operative, and is as follows:—"I devise, direct, and declare that *all lands*, hereditaments, and premises which my grand-nephew, the said Henry Ormsby Rose, shall take at my death, or be entitled to, under any will or codicil made by me, shall be held by him, and to his use in tail male only." The plain and indisputable effect of these words, which are technical words apparently used correctly, is to declare an intention that Henry Ormsby, junior, shall take the same estate, in quantity and quality, in all lands which shall come to him anyhow, by or on the testator's death—and more especially by the will or any codicil thereto. This provision undoubtedly has appropriate subject matter on which to operate, and *must* enlarge one estate, reduce another, and leave a third unaffected, anyhow you apply it, if you give it its plain and clear effect of making all the estates the same, in other words of turning several different estates into one and the same estate "*only.*" Under the will, the first codicil, and the residuary gift in the second codicil, Henry Ormsby, junior, but for this clause, would take some lands, *e.g.* Ballyclough, as

(1) 44 Ch. D. 606.

tenant in tail male, other lands, *e.g.* Lisdeen, as tenant for life, and other lands again, *e.g.* Ballyea, in fee-simple. It is idle to say that, as to some of these lands, the clause is inoperative as only giving him an estate in tail male which he had already, because its object was to assimilate his estate in "*all the lands*" to the estate which he already had in some of them, and the objection, therefore, would equally apply in any case. What, then, is this homogeneous estate which he is to take in "*all the lands*"? Stricter or plainer words could not be used. The lands "*shall be held by him, and to his use in tail male only.*" In this assimilating clause, even the word "*only*" is not without effect. It may mean "*tail male and no more,*" which is appropriate to the cutting down of the estate in fee-simple in Ballyea; or it may emphasize the intention that an estate in tail male, and such an estate only, is the one sort of estate which is to be taken in "*all the lands.*" But the introduction of that word cannot give less than the estate in tail male to which it is applied, far less can it support the appellant's contention that Henry Ormsby, junior, is to take only an estate for life, and the appellant has wholly failed to show any single or homogeneous estate in "*all the lands*" which can be given, consistently with this clause, except an estate "*in tail male only*"—words of art describing a known estate, which actually occur in the first codicil, while estates in tail male are given throughout the will, amongst others, to Henry Ormsby, junior, himself. There being no room for doubt as to the meaning or effect of the second clause, taken by itself, the appellant is driven to contend that it is altered by the third clause; in other words, that the two clauses are inconsistent.

Before discussing that contention, I wish to observe that I entertain very serious doubts, which have been raised by the appellant's arguments as to the testator's real intention, and I must explain why I find it impossible to give effect to those doubts. The very nature of the mistake, if mistake there be, in the expression of the testator's intention, and the very facility with which the origin of the mistake can be conjectured show, both how easily it might occur, and how impossible it is for a tribunal of interpretation to correct it.

It is likely enough that when Henry Ormsby, senior, died, the

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testator intended to make Henry Ormsby Rose, junior, a tenant for life only, and to limit all the estates after his death by way of remainder to his issue in tail male, in other words, to put all the lands into strict settlement. He may even have so instructed his solicitor. The second codicil may have been drawn as it stands, because the testator or his solicitor confounded a limitation in tail male with a strict settlement. The clerk may have miscopied the one word "use" for "sons," or for "issue." But any attempt to set such mistakes right would violate the fundamental principles of our law, by going outside the will for evidence to alter its terms, or by assuming jurisdiction not to interpret, but to rectify, not to construe, but to correct. The lands were entailed, at the least, upon a boy ten years old; this was *pro tanto* an effective settlement and I can go no farther. "Changing words," when legitimate, is really a process of interpretation, and mistakes can not be corrected by any alteration of the words actually used, unless the will itself supplies not only the proof of the error, but also the materials for correcting it.

With the second clause thus, in my opinion, operative and clear, I must give effect to it unless the third clause alters the disposition which it has made. This is the clause:—"And I hereby declare that my *said* will and the first codicil thereto shall be construed, and take effect throughout, as if the names of my *said* grand-nephews, the *said* Robert de Ros Rose and Henry Ormsby Rose, had been inserted in my *said* will and first codicil thereto, instead of the *said* name of the *said* Henry Ormsby Rose, deceased." It is remarkable that in every instance the word "*said*" in this clause relates back to the first clause, and not to the second, which stands complete by itself; it also in terms directs the substitution of *the names of both* the grand-nephews for the one *name of* Henry Ormsby, senior, deceased, thus in terms repeating the very same inaccuracy of expression which occurs in the first clause. If we interpret the substitution directed by "the dictionary" which the first clause thus supplies, and read Robert de Ros Rose and Henry Ormsby Rose, junior, instead of the names of Robert de Ros Rose, and Henry Ormsby Rose, senior, where both occur together, there is appropriate matter for the change both in the will and in the first codicil.

First, in the will, the change is operative, and is required, to make the legacies and annuities payable in equal shares by Robert de Ros, and Henry Ormsby, junior, out of the properties in the first instance devised to them—

Secondly, in the will, the substitution may be appropriately, and not without effect, made in the appointment of Robert de Ros and Henry Ormsby, junior, as residuary legatees *and devisees*—and

Thirdly, in the first codicil, it is appropriate, and operative, in the residuary devise and bequest to Robert de Ros Rose and Henry Ormsby Rose, junior, as tenants in common—

Lastly, it is appropriate in the appointment of executors, though it may be redundant, because that appointment is also made in the second codicil. I cannot say that the repetition of the inaccuracy of substituting two names for one, which had already occurred in the first clause, justifies our treating this third clause, even taken literally, as “abject nonsense and mere drivel.” Far less can I give it a non-literal interpretation, which either makes nonsense of some part of the disposition of every one of the testator’s estates, or alters the clear and plain language and effect of the second clause, takes away Henry Ormsby, junior’s, estate in tail male, and either gives him an estate for life only in all the lands derived by him from the testator, or gives him different estates in different lands, contrary to the express words of the second clause. It is doubly impossible to give such an effect to the third clause, when the second codicil closes with an express confirmation of the will and first codicil “in all other respects.” I cannot strike out, or abrogate, the assimilating clause, the most emphatic operative clause of the second codicil, and if I assimilate the estates, an estate “in tail male only” is the only possible estate to be given. The Lord Chief Justice, as I understand, does not assimilate the estates at all, but gives an estate for life in all the estates except Ballyea, and an estate in fee-simple in that, thus giving every estate except the one and “only” estate named in the codicil.

No other construction of this third clause can be worked out. If it is taken to mean that the name of Henry Ormsby, junior, is to be inserted instead of the name of Henry Ormsby, senior, where

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Appeal. that name occurs alone, we must, in the first place, overlook "the
 1896. dictionary," and hold that the testator had become more accurate
 ROSE by the time he got to the third clause, than he had been
 v. when he wrote the first. In the second place, we must disregard
 ROSE. the express direction to insert the *names* of *both* grand-nephews,
 Fitz Gibbon, wherever we make the change; and in the third place, we must
 L.J. make an attempt which must break down anyhow we try it.

In the first codicil, if we insert the one name of Henry Ormsby, junior, for that of his father, we bring out a devise of Lisdeen to Henry Ormsby, junior, for life without impeachment of waste, and after his decease with remainder to the use of "his son," *i.e.* himself, Henry Rose for life, and his sons successively in tail male, and for default of such issue remainder to the use of the second and every other son of the said Henry Ormsby, junior, according to their respective seniorities in tail male. If, on the other hand, we attempt to insert the two names of Robert de Ros, and Henry Ormsby, junior, instead of the name of Henry Ormsby, senior, deceased, where it occurs alone, the experiment will succeed only where it will make Robert de Ros, and Henry Ormsby, junior, devisees to uses at the beginning of the will, but it will turn the devises of Rathbane, and of Ballyclough, and in short, every devise of lands in which Henry Ormsby, senior, is the first taker, into a joint gift to Robert de Ros and Henry Ormsby, junior, and their male issue, utterly repugnant to every context in which it occurs. Under such circumstances, by the most fundamental canons of construction, we cannot alter the plain gift of all the lands in tail male to Henry Ormsby Rose, contained in the second clause, by means of a doubtful or conjectural interpretation of the third clause. The doubts, if doubts there be, whether the testator intended to give Henry Ormsby, junior, on attaining twenty-one years, the powers which the law attaches to an estate in tail male, and which he has exercised in favour of the defendants, rest, in my opinion, upon suspicion and conjecture only, while the estate in tail male is given to him in plain words which cannot be cut down, or explained away, by any of the other provisions found in the will or either codicil. Beyond these we cannot look. We are a Court of construction; we are not the testator. It is our duty to interpret, not to edit; to

construe, not to conjecture. We are judges, not scholiasts; and the document which is before us, though it may be a corrupt text, or may not correctly express what the testator really meant, must be taken as it stands. I am forced by its language to hold that Henry Ormsby Rose, junior, had power to disentail all the lands with which he dealt by the deeds of October 24, 1887, and therefore that the plaintiff has now no interest in any part of those lands.

But all the defendants, being in the same interest, ought to have appeared together on the appeal, and we can give only one set of costs in this Court, to be divided, if necessary, between the jointress Emily Rose, and the other defendants Alicia Maria Rose, and Mary Rose.

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BARRY, L.J.:—

In this case I am reluctantly compelled to come to the conclusion that the decree of the Master of the Rolls should be affirmed. I say, reluctantly, because it is another instance of a Court putting upon a will a construction which, instead of carrying out (as is the fundamental theory of its function) the intention of the testator, produces a result which he never contemplated, and which, if suggested to him, and its consequences understood by him, he would have emphatically rejected. I have more than once expressed my views in disapproval of our system of ignoring or disappointing by force of artificial rules of construction, the obvious intention of a testator. These views have often been the subject of good-natured criticism by my brother Fitz Gibbon (and I am sure of the comments of other, not so good-natured, but much less important critics), as being “eccentric”; but in the present case I do not attribute the mischief so much, if at all, to these artificial rules, as to the singularly careless, or ignorant, frame and language of the second codicil, upon which the question arises. In the view which I take of the case it is not necessary for me to follow the Lord Chief Justice, and my brother Fitz Gibbon in their elaborate scrutiny and criticism in detail of the several limitations and clauses of the will and the two codicils. In some of the propositions of the Lord Chief Justice I agree, in some I disagree. In some of the propositions of my brother Fitz

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Gibbon I am disposed to agree, in some to disagree. For example, I agree with the Lord Chief Justice in thinking that construing this will and first codicil unfettered by technical rules, and as one would construe any ordinary document, the intention of the testator was to keep his properties (as far as, perhaps, he believed to be legally possible), to use the common phrase, "tied up" in the Rose family, and I am not prepared to yield to the view of my brother Fitz Gibbon that this intention is negatived by the fact that although by the first codicil he made Henry Ormsby, junior, tenant for life of Lisdeen, he left him tenant in tail male in remainder of other denominations. On the other hand, I do not agree with the Lord Chief Justice that the fact, that the respondents' construction of the second codicil necessitates for the purpose of "assimilation" that Henry junior's estate in the residue should be reduced from a fee-simple to an estate in tail male, (though such may be, as his Lordship suggests, a very unusual form of a residuary devise), is sufficient to defeat the respondents' contention.

In the main conclusion arrived at by the Lord Chief Justice, namely, that the second clause of the second codicil has the effect of making Henry, junior, tenant for life, with remainder to his first and other sons in tail male, I cannot agree.

The principle of construction which, I think, applicable, and which I apply, to this case, is perfectly familiar, and is felicitously expressed by Lord Esher, in a case not cited in the argument, but which has been referred to by the Lord Chief Justice—that is the case of *Re Bedson's Trusts* (1). Lord Esher, there, at p. 525, says:—"I agree with the late Master of the Rolls, that the artificial rules which have been laid down for the construction of wills, have been carried too far, and that a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents, and not according to such artificial rules. What I am saying does not apply to wills of real property, in which well-known technical phrases as to realty are used, and where, therefore, such wills should be construed according to the established technical meaning of such words of

art." Now, the words in the second codicil are essentially "words of art." It might be suggested that the words, "tail male," were not, until recently, "words of art" in a deed, but they certainly always were so in a will, and now, by the Conveyancing Act, 1881, section 51, it has been enacted—"In a deed it shall be sufficient, in the limitation of an estate in fee-simple, to use the words in fee-simple, without the words heirs, and in the limitation of an estate in tail to use the words in tail, without the words, heirs of the body." I think it impossible to contend that the words in this second clause of the second codicil are not "words of art," bearing a technical meaning, and which must have that meaning unless it be excluded (which I think it is not), by some overwhelming language of the testator of the most unequivocal character. But, in answer to this, it is said that the language of this second clause is equivocal, and special reliance is placed on the word "only," which is said to be a word of "diminution or reduction," and not of "enlargement." Well, assuming the word to be used inaccurately, no case has been, or, I believe, can be cited, approaching the authorisation of our construing, on the ground of such an inaccuracy or ambiguity, the clear, technical words, "in tail male," to mean an estate for life, with remainder to the first and other sons in tail male. The Lord Chief Justice construes the word "only," as absolutely inconsistent with an enlargement of Henry's estate for life to an estate in tail male. But is it so? I freely admit that, if I were at liberty to speculate upon the intention of the testator, I would entertain no doubt that he never meant to give to Henry, junior, the power of absolutely disposing of the estate by disentailment, but we have not to speculate on what he meant, but to construe what he has expressed. The language of this second clause of the second codicil is—"I devise, direct, and declare, that *all lands*, which my grand-nephew Henry Ormsby Rose shall take at my death, or be entitled to under any will or codicil made by me, shall be held by him, and to his use in tail male only." At the time when that second codicil was drawn, Henry Ormsby Rose was to take some lands in fee-simple, some in tail male, and some for life, and here appears the force of the argument of the respondents, that this clause of the codicil is one of "assimilation," for,

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in that assimilation we find a simple and consistent meaning for the word "only."

In this construction we give force and effect to every word of the clause. When we reduce the fee-simple to an estate in tail male we comply with this clause; when we enlarge the estate for life into an estate in tail male, we comply with this clause, and when we come to deal with the lands to be held in tail male, we comply with the clause by leaving them as we find them. There is the assimilation—*all lands* which Henry Ormsby Rose, junior, was to take under any will or codicil made by the testator, were to be held by him "in tail male only"—that is in tail male, *and for no other sort of estate*. That is a reasonable and consistent meaning of "only." I do not lay down the proposition that even words of art may not be modified by context; what I do say is that the context relied upon here is not such as to justify our holding that the words, "in tail male only" can be construed to mean that Henry Ormsby Rose was to be tenant for life, with remainder to his sons successively in tail male. Upon these grounds I am of opinion, that the words in the second clause of this codicil are too strong, not to have their full ordinary meaning assigned to them, and I am of opinion that the decision of the Master of the Rolls must be affirmed.

Solicitor for the plaintiff: *Francis M. Fitt.*

Solicitor for the defendants Alicia and Mary Rose, and for the trustees: *Edward Leech.*

Solicitor for the defendant Emily Rose: *Deverell.*

R. D. M.

IN THE MATTER OF THE NATIONAL DEBT ACT, 1870;
EX PARTE THE REV. MICHAEL BYRNE.

M R.

1896.

March 10.

National Debt Act, 1870 (33 & 34 Vict. c. 71)—Unclaimed dividends—Re-transfer of stock to personal representative of deceased stockholder—Form of order.

A testator died in 1876 possessed of a sum of consols standing in his name in the books of the Bank of Ireland. The testator appointed four executors, one of whom proved his will, the second and third renounced, and the rights of the fourth were reserved. The executors were ignorant of the existence of the stock, and, the dividends thereon not having been claimed, the stock was, in 1886, transferred to the National Debt Commissioners, pursuant to the National Debt Act, 1870. The acting executor died in 1888, and his will was proved by A and B, his executors. B survived A, and died in 1893, and his will was proved by C, his executor. The executor of the original testator whose rights had been reserved died in 1890 without having applied for probate. C, having become aware of the existence of the stock, as personal representative of the original testator, applied by petition to the Court for a re-transfer of the stock and payment of the dividends on his undertaking to duly administer the fund.

The Court made an order for the transfer of the stock and dividends thereon into Court, the petitioner undertaking to institute proceedings by summons for the administration of the estate of the testator.

PETITION.

James Hughes, late of Naas, in the county of Kildare, parish priest, by his will, dated April 28th, 1876, appointed the Roman Catholic Bishop for the time being of the dioceses of Kildare and Leighlin, the Rev. Martin Nolan of Newbridge, in the county of Kildare, parish priest, Thomas Boulger, and Patrick Mooney, both of Naas, aforesaid, his trustees and executors. By his will the testator, after certain bequests of leasehold property, bequeathed to his said trustees, their executors and administrators, all his personal estate, except the said leasehold property, upon trust that his said trustees, or the survivors or survivor of them should convert into money such part of his said personal estate so bequeathed to them as aforesaid as should not consist of money, and should

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out of the moneys to arise from such conversion, and out of the money of which he should be possessed at his death, pay his debts, funeral, and testamentary expenses, and the legacies bequeathed by his said will, and should apply the remainder thereof in manner by his said will provided, namely, in payment of certain charitable legacies, and for the celebration of the usual number of masses, as soon as might be after his decease, by priests secular and regular in the dioceses of Kildare and Leighlin. The testator directed that any question arising under his will was to be referred to the Roman Catholic Bishop for the time being of the diocese of Kildare and Leighlin. The testator died on May 5th, 1876, without having revoked or altered his will, which was proved on June 8th, 1876, by the Right Rev. James Walsh, Roman Catholic Bishop of Kildare and Leighlin, Thomas Bulger and Patrick Mooney having renounced, and the rights of the said Rev. Martin Nolan being reserved. The personal estate of the testator at the time of his death comprised among other property the sum of £1020 7s. consols standing in his name in the books of the Governor and Company of the Bank of Ireland. The said Right Rev. James Walsh by his will dated February 25th, 1886, appointed the Rev. Thomas Geoghegan, the Rev. Arnold Wall, and the Rev. Michael J. Murphy, his executors, and died on March 5th, 1888. Probate of his will was on August 10th, 1889, granted to the said Thomas Geoghegan and Arnold Wall, the said Rev. Michael J. Murphy having renounced.

Thomas Geoghegan died on December 25th, 1889, leaving Arnold Wall him surviving. Arnold Wall by his will dated January 16th, 1892, appointed the petitioner his sole executor. Arnold Wall died on August 28th, 1893, and his will was proved by the petitioner on January 22, 1895. Martin Nolan died on June 14th, 1890, without having acted in the trusts of the will of James Hughes, and without ever having obtained probate thereof. The dividends upon the consols were received by the said James Hughes down to the date of his death, but it had only lately come to the knowledge of the persons interested in his personal estate that he was at the time of his death entitled to the consols, and as no dividends were ever claimed thereon since his death, the consols, together with all the unclaimed dividends

which had accrued due upon the same, were on July 30th, 1886, in pursuance of the National Debt Act, 1870 (33 & 34 Vict. c. 71, sect. 51), carried over and were standing to the account of the Commissioners for the reduction of the National Debt in the books of the Governor and Company of the Bank of Ireland. The petitioner applied to the bank for a re-transfer of the said sum of £1020 7s. consols, and the accumulated dividends thereof, but the bank refused to direct the said transfer.

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The petitioner accordingly applied to the Court pursuant to sect. 55 of the said Act for a transfer to him of the said sum of £1020 7s. consols, together with all the unclaimed dividends therein accrued due prior to and since the transfer to the Commissioners for the reduction of the National Debt, and the accumulations, if any, thereof, the petitioner undertaking to apply the same in due course of administration and in accordance with the trusts of the will of the said James Hughes or for such other order as to the Court should seem fit. The notice of motion was served upon the Attorney-General for Ireland and on the Commissioners pursuant to the provisions of sect. 55.

Carton, Q.C., and M'Cann, for the petitioner:—

Section 55 of the Act provides for re-transfer and payment to a person showing title to the stock, and that if the bank is not satisfied of the rights of the claimant, he may by petition to the Court of Chancery state and verify his claim. The petition is to be served on the Attorney-General and on the National Debt Commissioners, and the Court may make such order thereon either for re-transfer of the stock, to which the petition relates, and payment of the dividends accrued thereon, or otherwise, and touching the costs of the application, as to the Court seems just.

As soon as the existence of this fund became known to the present Bishop of Kildare and Leighlin, he applied to the Probate Division of the High Court for a grant of probate of the will of James Hughes, or in the alternative for a grant of administration, *de bonis non*, but the application was refused on the ground that the petitioner, the executor of the Rev. Arnold Wall, represented the testator James Hughes. See *The Goods of*

M. R. *Noddings* (1); *The Goods of Lorimer* (2), 22 & 23 Vict. c. 31, s. 12.
 1896. As to the form of order under 33 & 34 Vict. c. 71, see *Seton*

In re on Decrees, vol. 3, p. 2086, and *Ex parte Jameson* (3), there
 NATIONAL cited. Advertisements are necessary before re-transfer: see sec-
 DEBT ACT; tion 57.
Ex parte
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The petitioner is willing that the fund should be lodged in Court, pending administration.

Morphy, for the Attorney-General.

J. F. V. Fitzgerald, for the National Debt Commissioners.

THE MASTER OF THE ROLLS made the following order:—

“THE petitioner, by his counsel, undertaking, when the fund herein-
 after mentioned, shall have been transferred into Court, as herein-
 after mentioned, to institute proceedings by summons for the
 administration of the estate of the Reverend James Hughes,
 deceased, it is ordered that the Commissioners of the National
 Debt be at liberty to transfer into Court, to the credit of this
 matter, as in the lodgment schedule hereto annexed, the sum of
 £1020 7s. New Consols, now standing in their names in the books
 of the Governors and Company of the Bank of Ireland, together
 with all unclaimed dividends accrued due thereon prior to and since
 the transfer of such stock to the said Commissioners, and the accu-
 mulations, if any, thereof, unless cause be shown to the contrary
 by affidavit on or before the 15th of April next; and it is ordered
 that advertisements of this order be published in the usual manner,
 and this Court doth declare the petitioner and the several parties
 appearing on this petition entitled to their costs of the said petition
 and order and proceedings thereunder, when taxed and ascertained,
 out of the said funds; and it is ordered that the same be paid as in
 the said schedule hereto annexed.”

Solicitor for the petitioner: *Maxwell*.

Solicitor for the Commissioners: *Cole*.

Solicitor for the Attorney-General: *Warren*.

W. L.

(1) 2 S. & T. 15.

(2) *Ibid.* 471.

(3) L. R. 19 Eq. 430.

DUBLIN CORPORATION *v.* BARRY.

V.-C.

1896.

Oct. 27.

Sale of interest in lease—Rent paid in advance.

Purchasers bought a lessee's interest in a term of years, the rent for the last year of the term having been paid at the commencement of the letting:—

Held, that the vendor was not entitled to the year's rent which had been paid in advance, in addition to the purchase-money.

SUMMONS on behalf of the purchasers, the Corporation of Dublin, for an order that the rent, under a lease, dated 19th June, 1876, and made between the Lord Mayor, Aldermen, and Burgesses of the City of Dublin, of the one part, and Bridget Cass and Maria Cass, of the other part, for thirty-one years, from 28th March, 1867, at the yearly rent of £30, be apportioned up to the date of giving possession of said premises to the said Lord Mayor, Aldermen, and Burgesses, without having any regard to the fact, that, at the date of said lease, the rent, for the last year of said term, was paid to the lessors, and without payment by the purchasers to the vendor, of £30, representing the last year's rent of the said term, and also for an order, that, on payment of £350 (the purchase-money), the purchasers were entitled to a conveyance, and to possession of said premises.

The summons was grounded on an affidavit of Richard Parr, from which it appeared that the Corporation of Dublin had, by lease, dated 19th January, 1876, demised to Bridget Cass and Maria Cass, a house and premises, 56, Fleet-street, in the City of Dublin, from 25th March 1867, for the term of thirty-one years, at the yearly rent of £30, except the last, the lessees having, before the execution of the lease, paid the sum of £30, in advance, for the last year of said term, and it was agreed that the lessees, and their executors, administrators, and assigns, should not be charged, or chargeable with, or liable to pay any rent for the last year of the term.

Thomas Barry had acquired the lessees' interest in the lease, and the Corporation agreed to purchase the lessees' interest in the

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premises from him, for £350; the rent under the said lease and the taxes to be apportioned up to the date of giving possession.

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Philip White, for the purchasers:—

The Corporation are becoming the assigns of the lessees under the agreement within the covenant. The lessees' interest has been agreed to be purchased from the vendor.

Daniel Kehoe, for the vendor:—

An apportionment of rent implies that the purchasers are, from the date of the apportionment, liable to pay it. The vendor is entitled to the £30 rent paid in advance, in addition to the £350 purchase money, for the interest in the lease.

THE VICE-CHANCELLOR:—

I do not think so, and I must rule the other way, and declare as in the first part of the summons.

Solicitor for the Dublin Corporation: *Henry Bonass*.

Solicitor for the vendor: *P. W. Murphy*.

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M'FERRAN v. M'FERRAN.

Nov. 16.

(1896. No. 826.)

Practice—Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 2—Widow's charge—Right to administer real estate.

The widow of an intestate entitled, under the Intestates' Estate Act, 1890, to a charge for £500 upon his real and personal estate, has a sufficient interest in the real estate to entitle her to maintain an action for its administration.

ORIGINATING SUMMONS.

The Reverend James M'Ferran died on the 10th April, 1896, intestate, leaving a widow, but no issue. His widow obtained letters of administration. The intestate left real and personal estate,

the net value of which exceeded £500. It was uncertain who were entitled as next of kin, and who was heir-at-law, and in order to raise the proportion of the widow's charge of £500, under the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), which was payable out of the real estate, it was necessary to ascertain who was heir-at-law, and as such entitled to the realty.

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The widow brought this action against James M'Ferran, who claimed to be one of the next-of-kin, and John M'Ferran, alleged to be heir-at-law, for the administration of the real and personal estate of the intestate.

J. H. Moore, for the plaintiff, submitted, that although the widow's right to dower would not enable her to maintain an action for the administration of the real estate, her charge, under the Act, gave her a sufficient interest in the realty to entitle her to an order for its administration. He referred to *Duret v. Charrière* (1).

The defendant did not oppose the application.

THE VICE-CHANCELLOR made an order for the administration of the real and personal estate, with inquiries for next-of-kin and heir-at-law (2).

Solicitor for the plaintiff: *James Campbell*.

Solicitor for the defendants: *J. G. Shaw*.

D. M'C. M.

(1) [1896] 1 Ch. 912.

(2) In *Ireland v. Fairtlough*, where a plenary action was brought to raise the widow's charge, the Master of the Rolls intimated that an originating summons for administration would have been the proper procedure.—[Ed.]

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May 16.
June 5.

ARTHUR v. WALKER.

(1895. No. 158.)

Settlement—Construction—Limitation to A and his heirs, with limitation over in default of issue of A.

By settlement made in 1852 A conveyed freehold property to trustees upon trust for A for life, and after her death, in the event of B and C, the daughters of A, surviving A, upon trust for B and C as tenants in common, and after the deaths of B and C upon trust for their issue, as they should appoint, and in default of appointment upon trust for their children share and share alike; and in case of the death of either B or C in the lifetime of A, without leaving issue, then upon trust for the survivor and her heirs and assigns for ever; and in default of issue of either of them, in trust for D and E (the sons of A), their heirs and assigns as tenants in common, and to their heirs for ever.

B died in the lifetime of A unmarried. C survived A, and died unmarried having by her will disposed of her portion of the freehold property to her niece F for life, with remainder to F's children as she should appoint, and in default of appointment to F's children equally.

C entered into possession of the property on the death of A, and on the death of C, F entered into possession:—

Held, that on the death of C without issue the property passed to D and E as tenants in common in fee-simple.

Morgan v. Morgan (L. R. 10 Eq. 99) followed.

SPECIAL CASE, as follows:—

1. By indenture, dated the 8th September, 1826, and made between Peter Murray of the one part and Francis M'Minn and Robert Hawthorn of the other part, the said Peter Murray granted unto the said Francis M'Minn and Robert Hawthorn the houses and tenements situate on the shore front of Donaghadee, in the county of Down, therein described, to hold unto the said Francis M'Minn and Robert Hawthorn, and the survivor of them, their heirs, executors, and administrators, for ever, subject to the yearly rent of twelve shillings, in trust to permit Eleanor Murray, her heirs, executors, administrators, and assigns, to possess and enjoy the said premises, and the rents and profits thereof, from thence-

forth, for her own sole and separate use, and for her the said Eleanor Murray, at any time during her life, either by deed or will duly executed, to assign and convey the said premises, either in part or in whole, to such person and persons, and for such use or uses, at such rents, and for such term or terms of lives, or lives and years, or for ever, as she the said Eleanor Murray might direct and appoint, thereby giving the said Eleanor Murray absolute power and control over the same, and, failing such deed or deeds, upon the trusts, uses and limitations therein mentioned.

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2. The said Eleanor Murray subsequently married William Arthur, since deceased, by whom she had issue four children—namely, the plaintiff William Arthur, the defendant James Arthur, and Ellen Arthur, and Margaret Ann Arthur hereinafter mentioned.

3. By indenture of settlement dated the 10th September, 1852, and made between the said Eleanor Arthur of the one part and the Rev. John M'Auley and Henry Milford of the other part, the said Eleanor Arthur, by virtue of the powers above mentioned and of every other power enabling her in that behalf, granted and appointed to the said John M'Auley and Henry Milford the premises comprised in the said indenture of the 8th September, 1826, with others, to hold the same unto the said John M'Auley and Henry Milford, and the survivor of them, his heirs and assigns, for ever, subject to the rents payable thereout, upon trust that the said John M'Auley and Henry Milford, or other the trustee or trustees for the time being of the said indenture of the 10th September, 1852, should permit the said Eleanor Arthur and her assigns to receive for her own use the rents and profits of the said tenements and premises thereby granted for and during the term of her natural life, without impeachment of waste, and from and after the decease of the said Eleanor Arthur to the uses and upon the trusts by the said indenture declared in the words and figures following, that is to say :—"To the use of the said John M'Auley and Henry Milford, their heirs and assigns, upon trust to permit and suffer the before-named Ellen Arthur, spinster, and Margaret Ann Arthur " (being the daughters of the said Eleanor Arthur hereinbefore mentioned), "in case they shall survive the said Eleanor Arthur, party hereto, to have, receive, and take the rents,

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issues, and profits of the said tenements and premises in equal shares and proportions as tenants in common and not as joint tenants, independent of any husband or husbands they or any of them may hereafter marry, to be paid and payable upon the receipts alone of the said Ellen Arthur, spinster, and Margaret Ann Arthur, and free from the debts and control of any husband or husbands with whom they or any of them may intermarry as aforesaid, and from and immediately after the decease of the said Ellen Arthur, spinster, and Margaret Ann Arthur, in case they respectively shall marry and have issue, then to the use of the said John M'Auley and Henry Milford, their heirs and assigns, upon trust for such issue, in such shares and proportions, and at such time and times as they (the said Ellen Arthur, spinster, and Margaret Ann Arthur) shall, by deeds respectively duly executed in presence of two or more credible subscribing witnesses, or by their last wills and testaments in writing, in like manner duly executed and attested, notwithstanding their coverture, direct or appoint, and for want of such direction or appointment as aforesaid then to the use of the said John M'Auley and Henry Milford, their heirs, and assigns, upon trust for the respective children of the said Ellen Arthur, spinster, and Margaret Ann Arthur, share and share alike, on their respectively attaining the age of twenty-one years, or days of marriage, whichever shall first happen; and in case of the death of either of them the said Ellen Arthur, spinster, or Margaret Ann Arthur in the lifetime of the said Eleanor Arthur, party hereto, without leaving issue her surviving, then to the use of the said John M'Auley and Henry Milford, their heirs and assigns upon trust for the survivor of them, the said Ellen Arthur, spinster, and Margaret Ann Arthur, and her heirs and assigns for ever; and in default of issue of either of them the said Ellen Arthur, spinster, and Margaret Ann Arthur, then to the use of the said John M'Auley and Henry Milford, their heirs and assigns, in trust for the before-mentioned William Arthur" (being the plaintiff in this action) "and James Arthur" (being the defendant, James Arthur) "as tenants in common and not as joint tenants, and to their heirs and assigns for ever. Provided always, and it is hereby agreed by and between the parties hereto, that it shall and may be lawful to and for the said Eleanor Arthur at any time or

times hereafter, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing or any codicil or codicils thereto, to revoke, determine, and make void, or to alter or vary, all and every or any of the uses, estates, trusts, limitations, and powers hereinbefore limited, created, and declared of and concerning the said tenements and premises hereby settled and assured, or any part thereof, and by the same or any other deed or deeds, instrument or instruments in writing, to be sealed, delivered, and attested as aforesaid, or by her last will and testament in writing, or any codicil or codicils thereto, to limit, appoint, direct, or declare any new or other use or uses, estate or estates, trust or trusts, power or powers of and concerning the tenements and premises of and regarding which all or any or every of the uses, trusts, limitations, powers or provisions shall be so revoked, determined, or made void as aforesaid, which she shall think proper to limit, appoint, direct, or declare"; and the said settlement contained a power of sale, to be exercisable by the trustee or trustees thereof upon the request, in writing, of the said Eleanor Arthur, and subject to the conditions and directions therein mentioned; and also contained certain powers of leasing, to be exercisable by the said Eleanor Arthur during her life, and after her decease by the person or persons for the time being entitled to the rents and profits of the said premises.

4. The said Ellen Arthur subsequently died in the lifetime of the said Eleanor Arthur, intestate and without having been married.

5. The said Eleanor Arthur duly made her will, dated the 13th day of December, 1862, whereby she referred to and purported to confirm the said indenture of the 10th September, 1852, in the words and figures following:—"Whereas by a certain deed, etc., executed by me in the year eighteen hundred and fifty-two, I settled and assured my tenement in the town of Donaghadee aforesaid, wherein I carry on the business of an hotel-keeper, in trust for myself for life, and at my decease for my two daughters, Eleanor Arthur and Margaret Ann Arthur, with benefit of survivorship; and whereas my said daughter Eleanor

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has lately died, and the said Margaret Ann Arthur will on my decease be entitled, pursuant to the trusts of said deed, to the entire of said premises comprised in the said settlement. Now I do by this my will confirm the said settlement."

6. The said Eleanor Arthur died on the 1st day of December, 1873, without having executed any deed of revocation of the said settlement of the 10th September, 1852, and without having revoked or altered her said will.

7. From the death of the said Eleanor Arthur the said Margaret Ann Arthur, until her death upon the date hereinafter mentioned, continued to occupy the said premises, and to receive the rents and profits thereof for her own use and benefit.

8. The said Margaret Ann Arthur duly executed her will, dated the 3rd day of June, 1892, and thereby devised and bequeathed all her real and personal estate unto and to the use of the defendant Rev. Samuel Walker, and Richard Arthur Rogers, their heirs, executors, and administrators respectively, upon the trusts therein mentioned, that is to say, as to the portion of her said estate known as Arthur's Hotel, Donaghadee (being the premises above mentioned comprised in the said indenture of the 8th day of September, 1826), together with certain articles therein mentioned, upon trust, to permit her niece, the defendant Minnie Morrison, to use, occupy, and enjoy the same for her life, and on her death in trust for the children of the defendant Minnie Morrison, as she should appoint, and in default of and subject to such appointment, in trust for the children of the said Minnie Morrison, who, being sons, should attain twenty-one years of age, or, being daughters, should attain that age or marry, and she thereby appointed the said Rev. Samuel Walker and Richard Arthur Rogers executors of her said will.

9. The said Margaret Ann Arthur died on the 17th day of May, 1894, without having revoked or altered her said will, probate whereof was granted forth of the District Registry at Belfast of the Probate and Matrimonial Division of the High Court of Justice in Ireland on the 15th day of June, 1894, to the said Rev. Samuel Walker, the said Richard Arthur Rogers having by deed, dated the 17th day of September, 1894, disclaimed the trusts of said will, and having also renounced his right to probate thereof.

10. The said Minnie Morrison on the said 17th day of May, 1894, entered into possession of the said premises, and at present continues to occupy same.

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11. The said Minnie Morrison married on the 31st day of December, 1890, William Morrison, and there have been issue of the said marriage Margaret Ann Arthur Morrison and Charlotte Alicia Morrison, each of whom is an infant under the age of twenty-one years, and they are the only children of the said Minnie Morrison.

12. The said John M'Auley and Henry Milford are dead, and no trustees of the said indenture of the 10th day of September, 1852, have been appointed in their place.

The questions submitted for the opinion of the Court are :—

(1.) Is the plaintiff, William Arthur, under the trusts and limitations of the said indenture of the 10th day of September, 1852, and in the events which have happened, entitled in possession to one undivided moiety of the said lands and hereditaments situate on the shore front, in the town of Donaghadee and county of Down, assured by the last-mentioned indenture?

(2.) Who are the persons entitled under the trusts and limitations contained in the said indenture of the 10th day of September, 1852, and in the events which have happened, to the said premises on the death of the said Margaret Ann Arthur, and for what estates and interests are they so entitled?

(3.) By whom and out of what funds are the costs of this special case and of this action, and incident thereto, to be paid?

Serjeant Campion, Q.C., and Bates, for the plaintiff Arthur Walker :—

The manifest intention of the settlor was that the whole property should go over to the sons in the event (which happened) of the daughters having no issue. The words "in default of issue of either of them" must be read "in default of issue of the survivor," inasmuch as the issue of one daughter is disposed of in the event which happened, namely, of Ellen dying in the lifetime of the settlor. The words "in default of issue" must mean in

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the event of her dying without issue, not in the event of her dying without issue in the lifetime of the settlor. The apparently absolute estate given to the daughters is cut down by these words to an estate tail: *Morgan v. Morgan* (1), following the dictum of Gould, J., in *Fisher v. Wigg* (2), that a grant to a man and his heirs, but if he die *sans* issue, this turns the fee in the premises to an estate tail, and corrects the generality of the preceding words. The words are not “in default of *such* issue: *Idle v. Cook* (3); nor “*without leaving issue*,” as in *Olivant v. Wright* (4); in which cases it was held that an estate in fee-simple was not cut down to an estate tail by the gift over. There is no difference between a deed and a will in this respect: *Bamfield v. Popham* (5). The word “heirs” here in the context means “heirs of the body.”

Even if the moiety which accrued to Margaret on the death of Ellen went to her absolutely, Margaret’s original moiety remained subject to the limitations of the settlement, and passed on her death without issue to William and James Arthur.

Meredith, Q.C., and *J. H. Moore*, for the defendant Minnie Morrison and her children :—

The words, “in default of issue of either of them,” mean in the event of both daughters dying in the lifetime of the settlor without issue; there is no intention of cutting down the absolute gift, if one daughter survived. Margaret having survived the settlor took the whole property, and it passed under the will to the defendant Minnie Morrison, and her children. In *Morgan v. Morgan* (1), Lord Romilly did not give sufficient weight to *Idle v. Cook* (3), which is in favour of the defendants, as is also *Olivant v. Wright* (4), where Bacon, V.-C., does not quite agree with *Morgan v. Morgan* (1).

Secondly, the will of Eleanor Arthur is a revocation of the settlement as regards the whole property, or if not, of one moiety, and amounts to an appointment: *Lees v. Lees* (6).

(1) L. R. 10 Eq. 99.

(2) 1 P. Wms. 14.

(3) *Ibid.* 70.

(4) 9 Ch. D. 646.

(5) 1 P. Wms. 67.

(6) Ir. R. 5 Eq. 549.

M'Iroy, for the defendant James Arthur:—

James Arthur is the father of the defendant Minnie Morrison, and does not wish to take part in the case.

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Serjeant Campion, Q.C., in reply:—

The will cannot affect the settlement, which it merely confirms, and does not revoke.

THE MASTER OF THE ROLLS:—

June 5.

This settlement is so badly drawn that it is difficult in the extreme to put any consistent interpretation upon it. I can by no means agree with *Serjeant Campion*, who said that it was the plainest and most unequivocal case he had ever seen, and described the instrument as “transparent”; but it must be construed, and I shall endeavour to arrive at the legal effect of the language used, interpreting it according to the intention—but bearing in mind that it is a deed and not a will. The settlor reserves to herself a life estate in the premises in question, with remainder to her daughters *Ellen* and *Margaret Ann* as equitable tenants in common for their respective lives: with remainders to their respective issue as they should by deed or will respectively appoint, and in default of appointment for their respective children on their respectively attaining twenty-one or marriage. Up to this point there is no great difficulty; though it is evident that the draftsman blundered in not using words of inheritance in connexion with the remainders to the “children” of the respective daughters, thus leaving the fee undisposed of in default of appointment. But that question does not directly arise, since neither daughter had any child. The deed goes on:—“And in case of the death of either of them the said *Ellen* and *Margaret Ann* in the lifetime of” the settlor, “without leaving issue her surviving, then to the use of” the trustees in fee, “upon trust for the survivor of them the said *Ellen* and *Margaret Ann*, and her heirs and assigns, for ever.”

Again, pausing at this point, the effect of the instrument is clear. In the one event contemplated, viz. the death *sine prole* of either of the daughters in the lifetime of *Mrs. Arthur* the settlor, the undivided moiety in which she had a life estate would go to

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her surviving sister in fee-simple, whatever might become of original share of the surviving sister ; and since Ellen did die in the lifetime of the settlor without issue, leaving Margaret Ann her surviving, the latter would have clearly taken the moiety of the lands in fee-simple. There can be no doubt or question as to this. The difficulty arises then upon the words which follow : and since Margaret Ann, though surviving both her sister Ellen and her mother the settlor, has died unmarried and without issue, the question is whether what follows in the instrument has any effect, in the events which have happened, in enlarging her life estate in what I may call her original moiety, or in cutting down the fee-simple in the accrued moiety, or in both. The words are :—“ And in default of issue of either of them the said Ellen and Margaret Ann, then to the use of the ” (trustees in fee) “ in trust for ” the plaintiff and defendant James Arthur as tenants in common in fee-simple. Now whether these words were intended to apply to both moieties or not, I think it clear that at least they were meant to apply to the original shares, in which, as we have seen, the daughters respectively took no more than a life estate. Can these words have the effect of enlarging that life estate into an estate tail or any greater interest ? Plainly they cannot. A gift by deed to a man for life, and in the event of his dying without issue, or in default of issue, over, does not give him an estate of inheritance, for want of words of limitation : *Seagood v. Hone* (1). Of course it would be different in a will. It was suggested, on the authority of a note to the case of *Bamfield v. Popham* in 1 P. Wms., p. 57, that in a deed an estate tail would be implied from these words.

Powell, J., there says—“ There is no difference between a deed or a will in this case, for if a man does by deed give lands to A, without expressing any estate, and afterwards adds the words, If A die without issue, then to B, this makes an estate tail : Perk. sect. 173.” To this passage there is a footnote, as follows : “ But of this the Lord Keeper doubted. And *vide* Vaugh. 257, *et ante Fisher v. Wigg* (2) *contra*. But his lordship held, that where in the premises an estate is given by deed to one and his heirs, and if he die without issue, &c., these words are sufficient to

(1) Cro. Car. 366.

(2) 1 P. Wms. 14.

restrain the former words, and turn the fee into an entail, but will not of themselves create an estate tail."

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It is, however, of little practical moment in this case whether an estate tail in the original moiety could or could not be implied from these words, because if Margaret Anne had an estate tail she did not bar it, and so the remainder in her original moiety passes to the plaintiff and defendant James Arthur in fee as tenants in common.

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The more difficult question arises in reference to the accrued moiety. Do these words apply to it at all? And if they do, have they the effect of converting what otherwise would have been a clear estate in fee-simple into an estate in fee-tail?

I at first thought it doubtful whether they apply to the accrued share. That share has been limited in fee in the clearest and most express words known to the law. One might suppose it was then done with. There is a subject-matter to which they in any event do apply. In most of the cases in which such words have been held to cut down a fee-simple to a fee-tail, there was no question but that they must (whatever their effect) apply to the very disposition in question. Here it occurred to me as possible that the draftsman, finding that he had disposed of the original moieties only in the event of death without issue in the lifetime of the settlor, and perceiving that death without issue might occur after the settlor's death, proceeded (as he thought) to provide for the latter event, and did so in reference to the same property only. If so, the fee-simple would remain unaffected; and it is, no doubt, a guiding principle not to cut down a clear fee-simple, limited in apt legal language, without necessity.

But the clause in question comes in immediate sequence after the gift of the accruing share. It is impossible to sever it, whatever its effect be, from that. And more, on the general effect of the whole instrument it is, I think, impossible to suppose that the intention was to confer an absolute interest in the accruing share accidentally coming to one of the daughters, but only a qualified limited or contingent interest in the original share intended for her. It was the intention of the settlement that on failure or extinction of issue of both daughters the property should go to

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the sons of the settlor. Whether this has been done or not is a different question.

Mr. Moore argued that the second clause providing for want of issue should be construed as applying to the same event as the first, by reading into it the words "in the lifetime of the said Eleanor Arthur." Such a construction, if tenable, would meet the case of a daughter dying in the settlor's lifetime, leaving issue, and such issue all dying in the lifetime of the settlor. I cannot think this was meant, nor do the words import it. I must hold that the clause in question is applicable to the accrued as well as the original share, and that it imports an indefinite failure of issue.

If this view then be correct, how does the matter stand?

Two cases, in addition to the passage from the note to *Bamfield v. Popham* (1), already quoted, were relied on by the plaintiff's counsel for the proposition that by this language an estate tail only is given. These were *Fisher v. Wigg* (2), and *Morgan v. Morgan* (3).

In *Fisher v. Wigg* (2) no such question was decided. The point of that case was whether an estate was conferred in copyholds in joint tenancy or in tenancy in common by the words of the surrender. But the passage relied on is a *dictum* of Gould, J. (at p. 15):—"A grant to a man and his heirs, but if he die *sans issue*, &c., this turns the fee in the premises into an estate tail, and corrects the generality of the preceding words."

In *Morgan v. Morgan* (3), the words were—"to Thomas Morgan, his heirs and assigns, but if he died without issue," over. In that case by a settlement of the 29th November, 1791, made after the marriage of the great-grandfather of the plaintiff, the estate was conveyed to trustees and their heirs to the use of Rees Morgan, the settlor, for life, with remainder to the trustees, in order to secure an annuity to the wife of the settlor during her life in lieu of dower, and subject thereto to the use of David Morgan, the eldest son of the settlor, his heirs and assigns; but if he died without issue, then to Thomas Morgan, the second son, his heirs and assigns; and if both David Morgan and Thomas

(1) 1 P. Wms. 57.

(2) 1 P. Wms. 14.

(3) L. R. 10 Eq. 99.

Morgan died without issue, then to the male issue of Rees Morgan, the settlor; and if there should be no male issue, then to his daughters. David Morgan died without issue in the lifetime of Thomas Morgan, who afterwards died intestate, leaving David Morgan, the younger, his only son, him surviving. David Morgan, the younger, died subsequently, leaving the plaintiff Thomas Morgan, the younger, his only son and heir-at-law and in tail, him surviving. Rees Morgan, the settlor, survived his two eldest sons, and died leaving Rees Morgan, the younger, the defendant, his youngest son, and also the said David Morgan, the younger, his grandson and heir-at-law, him surviving.

The plaintiff claimed the estate against the defendant and his mortgagees. The question there was what estate David Morgan, the elder, and Thomas Morgan, the elder, took. The limitations were similar to those in the present case, namely, a gift in fee, followed by a gift over, if the person died without issue. *Fisher v. Wigg* (1) and *Idle v. Cook* (2) were cited in argument for the plaintiff to show that David Morgan the elder and Thomas Morgan the elder took estates tail, and that, that being so, the plaintiff the grandson and heir in tail of Thomas Morgan the elder was entitled to the estate. Lord Romilly, after taking time to consider, gave a very short judgment. He says: "The first question is what estate David Morgan the elder and Thomas Morgan the elder took in the Penylan property; and after considering the cases, and especially the case of *Fisher v. Wigg* (1) and the cases there cited, and notwithstanding the case of *Idle v. Cook* (2), which seems at first inconsistent with it, I am of opinion that David and Thomas Morgan each took an estate tail in the premises, and that unless they or one of them did some act to destroy the entail, it went to the issue of Thomas Morgan the elder as tenant in tail general."

On the other hand, *Idle v. Cook* (2), and *Olivant v. Wright* (3) were used by the defendants as showing that similar language could not have the effect contended for.

In *Idle v. Cook* (2), the words were (after a limitation which, as here, would have been in fee-simple), "*et pro defectu talis exitus*":

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(1) 1 P. Wms. 14.

(2) *Ibid.* 70.

(3) 9 Ch. D. 646.

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to the use of the right heirs of Z for ever—not of issue in general, but of *such* issue. Gould, J., was of opinion that the estate limited to Valentine and Alice was a fee-tail, but the other members of the Court held that it was an estate in fee.

Holt, C. J., says:—"I am of opinion that, as the words of this limitation are, the estate limited to Valentine and Alice is a fee-simple, and that as they stand originally upon the surrender in Latin, they cannot be construed to make an estate tail. I am satisfied that it was the surrenderor's intent to give Valentine and Alice only an estate tail; for which reason, I would willingly have construed it so, but could not make such construction consistently with reason, or any rules of law. The construction of this surrender must be the same as if an estate had been limited by feoffment, or any other deed, and must be alike governed by the same rules of the common law. It is necessary upon the creation of every estate tail, that it be expressed in certain of what body the heirs inheritable should issue: Lit. sect. 31; 1 Inst. 27. In a gift of lands to another to hold to him and to his heirs male, the word [*male*] was rejected, and the word [*heirs*] stood in the limitation to make a fee-simple, for that it could not be an intail, there being no limitation by the gift, of what body such issue should be; and yet in that case it was impossible to doubt that the intention of the donor was to make an estate tail: notwithstanding which it was held to be a fee-simple, and Lord Coke was very positive in his opinion. In the present case there is no certainty of whose body the heir shall be; and the words are sufficient to carry a fee-simple, indeed in a will such words would make an estate tail; purely upon the intent of the devisor; but there is a great difference betwixt a will and a conveyance at common law, as this is, for the law has appointed proper words to be made use of in limitations of estates in *deeds*, as the word [*heir*] to carry a fee-simple, and no other word tantamount or equivalent will be admitted, whereas in a will it is otherwise, for that is a new conveyance by force of the statute of 32 Henry 8, which says it shall be lawful for a man to dispose of his lands *by will, at his will and pleasure*, and this is the reason why a devise to a man *in perpetuum* passes a fee-simple, at the same time that these words in a deed give only estate for life.

In this limitation, we have no restrictive words to turn the estate, that by force of the first words is a fee-simple, into an estate tail, indeed, if it had been said, *if Valentine and Alice die without issue of their bodies*, that, being express and particular, would have made it an estate tail, but as it now stands, the first words carry a fee-simple, and the latter, being consistent with them, made no alteration in the estate. In the case of 5 H. 5. 6. and H. 6, the limitations are certain and express of whose body. But it is objected that an estate tail may arise by implication as in Perk. sect. 173. I agree that case to be law, for the words are express, but they are not so here; for in our case the words [*such issue*] import heirs general, for there is no heir but is the issue of somebody; so that it is only a limitation of one fee-simple upon another."

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In *Olivant v. Wright* (1) the previous cases were considered, and the Vice-Chancellor distinguished the instrument before him from that in *Morgan v. Morgan* (2) by the circumstance that in the former the words were "without leaving issue" and in the latter only "*without issue*."

The Vice-Chancellor says:—"No doubt the distinction between a deed and a will is a very palpable one. A deed is a contract by which the owner of property gives a certain destination to it then and thenceforth for ever, and he parts with all his power over it. A will is an instrument which is not to take effect till the death of the testator. The Court has gone great lengths in endeavouring to ascertain what was the intention of the testator in construing his will. In construing a deed, you must also ascertain what was the intention of the party. The intention here is obvious and distinct, and I do not believe that anyone alive, lawyer or layman, could read this instrument and doubt what the meaning of the words there contained ought to be. A man having to dispose of his property divides it into fifths; as to one-fifth, he leaves it to the children of a man named, and they being children at the time, he provides for the application of the income to their maintenance and education; upon their attaining twenty-one he gives it them absolutely. The deed is then complete, and has accomplished

(1) 9 Ch. D. 646.

(2) L. R. 10 Eq. 99.

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that entire object. Then it is suggested, or it occurs to somebody, that these children, now infants, whose maintenance is provided for, may die without leaving issue; and, in that event, he gives it over to somebody else. Then the contention before me is that I must read the intention of the settlor to be to cut down by means of words contained in the proviso that absolute interest which he has given in the preceding trust declared of the one-fifth. There is no principle of construction which would justify me in doing so. There is no authority, and there has been no case cited to me which would at all induce me to do so. The authority of *Forth v. Chapman* (1) need not be adverted to. This is not a will, and it is enough to dispose of that part of the case by saying that. But the other cases in which there have been under the consideration of the Court deeds, or something equivalent to deeds, do not seem to me to favour the construction that this settlor, who gave an absolute interest to two children, providing for their maintenance during their minority, and giving them the fee-simple when they attained twenty-one years—meant in the case mentioned in the proviso to do more than to provide for the circumstance of the absolute gift of the fee-simple made by him to the two children becoming abortive and inoperative because they or either of them might die in their infancy. That is the way I read the deed. In my opinion that is the only construction to be properly put on it. The only difficulty I have among all the cases which have been cited is that presented by the case of *Morgan v. Morgan* (2). But at the same time I cannot disregard the case of *Idle v. Cook* (3), where the decision plainly was, that there being a gift to the husband and wife for their lives, and afterwards to their issue, and a gift over in default of such issue, that had not the effect of cutting down the absolute unqualified fee-simple which was given by the previous trust contained in the surrender. I do not find that case engaged the attention of Lord Romilly in the case of *Morgan v. Morgan* (2). The only observation I can find in it is ‘notwithstanding *Idle v. Cook* (3).’ That, in my opinion, can be answered and disposed of by recollecting that the words are different, that the words in this case are ‘without leaving issue,’

(1) 1 P. Wms. 663. (2) L. R. 10 Eq. 99. (3) 1 P. Wms. 70, 75.

and in *Morgan v. Morgan* (1) they were 'without issue.' Adopting all that has been said about these cases—keeping in my mind the distinction between a will and a deed, which is that which I have already expressed, the intention being, notwithstanding, the governing principle in both cases—I read in this deed an intention, expressed and executed, that an interest in fee-simple shall be given to each of these children as soon as they shall respectively attain the age of twenty-one years, and if before that time—I do not mean that there are any such words in the deed, but as I construe the deed it means this—if before that time the provision he had made for these children should cease to be effectual, he gives it over to somebody else. That is the plain meaning of the deed. That, in my opinion, is the legal construction of the deed, and I think the only child of John Morris ultimately took on her father's death intestate an estate in fee-simple, and that that is bound by the settlement of 1859, afterwards executed, and that no estate tail was created."

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The words "without leaving issue" led the learned Judge to hold that the parties meant to create a fee-simple, determinable in one event, *i.e.* of there being no issue living at the death of the tenant for life, an intention which would have been inconsistent with an estate tail. He does not purport to overrule *Morgan v. Morgan* (1).

The rule on the subject is stated by Sir H. Elphinstone in his work on Deeds, at p. 248. Rule 84: A limitation "to A and his heirs" followed by a gift over, if A dies without issue, or "without heirs of his body," confers an estate tail on A. Rule 85: An estate in fee-simple is not cut down to an estate tail by a gift over "in default of *such* issue" or, "without *leaving* issue." The cases are discussed in the note to each rule.

The distinction seems slender; but it is founded on the principle recognised by Holt, C.J., that a man's heirs must be issue of somebody—whether of himself or not. Therefore a gift "to A B and his heirs—and in default of *such* issue" merely means in default of *heirs*, no matter whose issue such heirs may be. The limitation over introduced by these words would therefore be void as being a limitation after an estate in fee-simple. But when

(1) L. R. 10 Eq. 99.

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the lands are limited "to A B and his heirs; and in default of issue" over, the word "issue" cannot be referentially connected with the "heirs" previously mentioned, and therefore must refer to issue of the body of A B: since it cannot mean in default of the issue of every one in the whole world, that is on the extinction of the human race. I must take the law as I find it. In this case it happens to carry out what I believe to have been the intention of the instrument. The daughters having died unmarried and without issue, the property passes to the sons. Assuming the test to be whether or not the word issue in its context denotes issue of the body of the *propositus*, there can be no question whatever on this deed that it does so here, the children or issue of the daughters being plainly and definitely meant.

But Mr. Moore also relied upon the will of Mrs. Eleanor Arthur, the settlor. The settlement of 1852 contained a clause of revocation and new appointment in these words:—

"Provided always, and it is hereby agreed by and between the parties hereto, that it shall and may be lawful to and for the said Eleanor Arthur, at any time or times hereafter, by any deed or deeds, instrument or instruments, in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, to revoke, determine, and make void, or to alter or vary, all and every or any of the uses, estates and trusts, limitations, and powers hereinbefore limited, created, and declared, of and concerning the said tenements and premises hereby settled and assured, or any part thereof, and by the same or any other deed or deeds, instrument or instruments, in writing, to be sealed, delivered, and attested as aforesaid, or by her last will and testament in writing, or any codicil or codicils thereto, to limit, appoint, direct, or declare any new or other use or uses, estate or estates, trust or trusts, power or powers of and concerning the tenements and premises of and regarding which all or any or every of the uses, trusts, limitations, powers and provisions shall be so revoked, determined, or made void as aforesaid, which she shall think proper to limit, appoint, direct or declare." She made her will in December, 1862, and thus referred to the settlement:—
"Whereas, by a certain deed, &c., executed by me, I settled and

assured my tenement in the town of Donaghadee aforesaid, wherein I carry on the business of a hotel-keeper, in trust for myself for life, and at my decease for my two daughters, Eleanor Arthur and Margaret Ann Arthur, with benefit of survivorship; and whereas my said daughter Eleanor has lately died, and the said Margaret Ann Arthur will on my decease be entitled, pursuant to the trusts of the said deed, to the entire of the said premises comprised in the said settlement. Now I do, by this my will, confirm the said settlement."

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That she mistook or forgot the terms and the effect of the settlement may be true, if she ever understood it. But that she intended to revoke its uses and declare new ones is contradicted by the will itself. She confirms it in terms, and proceeds to misstate its effect. It is impossible to hold that this is a revocation and new appointment, though it may indicate that had she known all, she would have executed a proper instrument for that purpose. As I am of opinion, therefore, that under the settlement the plaintiff is entitled to succeed, and that the will of Mrs. Arthur does not affect the question, I must hold that the lands in dispute did not pass under the will of Margaret Ann Arthur, and that the plaintiff is entitled to the relief sought.

Solicitor for the plaintiff: *W. V. Davidson.*

Solicitor for the defendants the Rev. Samuel Walker and Minnie Morrison: *John G. Shaw.*

Solicitor for the defendant John Arthur: *J. D. Coates.*

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(1879. No. 1749.)

Jan. 13, 14,
29.

Appeal.
May 11-13.
June 23.

Will—Charge of legacies on real estate, if personal estate insufficient—Subsequent specific devise—Acquiescence—Lapse of time.

A testator bequeathed pecuniary legacies to his three daughters, chargeable upon and payable out of his chattel property, money, and effects, and, if the same should be insufficient, charged upon and payable out of his real and personal estates. The testator then devised the lands of A (held by him in fee-simple) to his second son, with remainder over to his eldest son in the event of his second son dying under twenty-one or without issue, and devised and bequeathed to his eldest son, *subject as aforesaid*, a brewery with the stock-in-trade belonging thereto, house property, farms, and fee-simple estates (which in fact constituted the residue of his property), and appointed his eldest son residuary legatee, and his wife and two other persons his executrix and executors.

By a codicil the testator increased the legacies to his three daughters by further sums, to be subject to the same conditions as the fortunes already left to them.

The testator died in 1860, and at that time his personal estate and effects were sufficient to pay his debts and legacies, and one of his daughters, who was married, received her legacy. The other two daughters, who were unmarried, were paid interest on their legacies, as well as on portions appointed to them by their father pursuant to his marriage settlement, by his personal representatives, and afterwards by their eldest brother.

The second son attained twenty-one, and died intestate and without issue, and thereupon the eldest son succeeded to the lands of A in addition to the property devised and bequeathed to him by the testator. The eldest son mortgaged the lands of A to K., and afterwards to a bank, making a statutory declaration that all his father's debts and legacies had been paid or satisfied, and died in 1879. By his will he bequeathed the lands of A to his two unmarried sisters, freed and discharged from the mortgages created by him, and left the residue of his property to his only daughter, a minor, and appointed his two sisters her guardians.

An action was brought in the name of the minor for the administration of the real and personal estate of her father, and a receiver was appointed over the lands of A and the other fee-simple lands.

In 1884 an order was made fixing the priorities of incumbrances upon the

said lands, under which interest was paid to the bank and to K on foot of their mortgages. The sisters made no claim upon the said lands in respect of their legacies, and interest was paid to them by their brother's executor down to 1886.

In 1889 one of the unmarried sisters died, having bequeathed all her property to her sister. In 1893 the lands of A were sold by leave of the Court under the Land Purchase Acts, and K. and the bank were returned as the only incumbrancers. In 1894 the surviving sister filed an objection to the schedule of incumbrances, claiming priority over K. and the bank on the ground that the legacies were a subsisting charge on the lands.

The proceeds of sale were transferred to the credit of the administration action to abide the order of the Court, and an application was made on behalf of the bank and K for payment out to them of the funds in Court on account of the sums due on foot of their mortgages:—

Held, by the Court of Appeal, affirming the decision of the Master of the Rolls—(1) that upon the true construction of the will the legacies were charged on the lands of A; (2) that in the events which happened the legacies were a subsisting charge on the lands, although at the time of the death of the testator the personal estate of the testator was sufficient to pay them; (3) that there was no laches or acquiescence on the part of the legatees to prevent them asserting their priority.

Richardson v. Morton (L. R. 13 Eq. 123) dissented from; *Massy's Estate* (14 Ir. Ch. R. 355) and *Bradford's Estate* ([1895] 1 Ir. R. 251) followed.

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MOTION.

This was an application on behalf of the Governor and Company of the Bank of Ireland, for an order, that the Accountant-General should transfer the sum of £3957 10s. 9d., guaranteed land stock, and pay the sum of £585 4s. 2d. cash in Court to the credit of this action, and separate credit of the lands of Ardagh, to Mrs. Louisa Kavanagh, personal representative of Mary Kavanagh, and the Governor and Company of the Bank of Ireland, on account of the sums due on foot of their mortgages of the said lands, and for directions consequent thereon.

The facts of the case were stated in the affidavit of Mr. John Malcolmson, solicitor for the Bank of Ireland, upon which the motion was grounded, and in an affidavit of Miss Louisa M'Carthy, made in reply thereto, and were as follows:—

This action was brought to administer the real and personal estate of Florence M'Carthy, and the lands of Ardagh, referred to in the notice of motion, formed part of his real estate, and had

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been sold by leave of the Court to tenants under the Lánd Purchase Acts, and the proceeds brought into Court, pending the determination of the question, whether certain legacies bequeathed to Kate M'Carthy and Louisa M'Carthy, the sisters of Florence M'Carthy, by their father, Daniel M'Carthy, were a subsisting charge on the lands of Ardagh, in priority to the mortgages of the said lands made by Florence M'Carthy to Miss Mary Kavanagh and to the Bank of Ireland.

Daniel M'Carthy, by his will dated July 26th, 1859, after confirming a jointure of £150 a-year to his wife, charged by his marriage settlement upon his house property in the town of Skibbereen, with the exception of his brewery and concerns annexed to it, devised and bequeathed to his executrix and executors all his estates, real and personal, upon the trusts, and for the purposes thereafter mentioned, in the first place to call in any debts and arrears of rent due to him, and the amount of an insurance on his life, and discharge his debts thereout; and, after making certain specific legacies (including furniture and a jaunting car) to his wife and children, and two legacies of £10 each to friends, and appointing (pursuant to the power contained in his marriage settlement), a sum of £2000 to his four younger children, Gerald, Kate, Margaret, and Louisa M'Carthy, in equal shares, he devised and bequeathed to his said three daughters a further sum of £700, payable to each of them, at the rate of 5 per cent. per annum, from the date of his death, to be paid, and payable out of, and charged, and chargeable in the first place, upon his chattel property, money, and effects, and if the same should be insufficient, then the said several sums to be paid, and payable out of, and charged and chargeable upon, his real and personal estate.

The testator then devised and bequeathed to his second son Gerald M'Carthy all his estate and interest in the farm and lands of Ardagh East, otherwise Ardagh Prior, together with a sum of £500 in addition to the legacies already bequeathed to him, and which latter sum was not to bear interest, and in the event of the death of his son Gerald, under the age of 21 years, or without leaving issue, remainder in the said lands of Ardagh to his eldest son Florence M'Carthy, remainder to his daughters in manner therein mentioned. He next gave, devised, and bequeathed to

his eldest son, Florence M'Carthy, *subject as aforesaid*, all his estate and interest in his brewery and corn stores, with the stock-in-trade and effects therein, his house property in or near the town of Skibbereen, his house, lands, and demesne of Glencurragh, with stock and implements thereon, his farm of Lyratrig, with the stock thereon, the Mardyke fields and the town fields adjoining the town of Skibbereen, and also his fee-simple estates of Drishane, Laheran, and English Island. He directed that the brewery business should be carried on during his son's minority, and that his dwelling-house of Glencurragh should be kept as a residence, rent free, for his wife during her life, and children during their minority, and appointed his eldest son, Florence M'Carthy, his residuary legatee, and his wife, Mary Sophia M'Carthy, his executrix, and the Rev. John Fitzpatrick and Daniel M'Cartie his executors.

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By a codicil to his will, dated the 11th June, 1860, he bequeathed to each of his three daughters, Kate, Margaret, and Louisa, in addition to the moneys he had already left them, a further sum of £300, this total sum of £900 to be subject to the same conditions as the fortunes he had already left them. By another codicil the testator appointed William Gallwey executor in the place of the Reverend John Fitzpatrick.

Daniel M'Carthy died on Nov. 4th, 1860, and his will was duly proved by his widow Mary Sophia M'Carthy, Daniel M'Cartie, and William Gallwey, on January 19th, 1861. Mary Sophia M'Carthy died on February 4th, 1866, having by her will dated November 28th, 1865, bequeathed the bulk of her property to her two daughters Kate and Louisa M'Carthy, and constituted them her residuary legatees, and appointed Daniel M'Cartie above-mentioned her executor, by whom her will was proved on June 5th, 1866. Wm. Gallwey died on December 3rd, 1868, and Daniel M'Cartie died on November 27th, 1869, intestate.

Gerald M'Carthy attained twenty-one years of age, and entered into possession of the lands of Ardagh, and died intestate, and unmarried on March 19th, 1875, when his brother Florence M'Carthy entered into possession of the lands of Ardagh. The brewery was carried on by Daniel M'Carthy's executors until Florence M'Carthy came of age, when he entered into possession of it and of the other property left to him under

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his father's will. On April 7th, 1863, a residuary account of the estate of Daniel M'Carthy was passed by Mary Sophia M'Carthy, his executrix, from which it appeared that after retaining a sum of £3500 to meet legacies, there was a surplus of £2632 6s. 2d.

Margaret M'Carthy married J. G. Martyn and received her legacy of £1000, and Gerald M'Carthy also received his legacy of £500. Kate and Louisa M'Carthy resided with their brother Florence at Glencurragh until his marriage in 1873, and were paid interest at the rate of 5 per cent. per annum on their legacies of £1000 each, and on the sums of £500 each, appointed to them by their father pursuant to his marriage settlement.

On June 8th, 1872, Florence M'Carthy mortgaged the lands of Drishane, Shantullagh, and English Island to Rev. Michael O'Hea, as trustee for Kate and Louisa M'Carthy to secure payment to them of the sum of £2000. This sum was made up of the sum of £1700, moneys of their mother Mary Sophia M'Carthy, to which they were entitled under her will, but which had been received by Florence, and of a sum of £300 added by him to make up the sum of £2000. This mortgage contained a covenant by Florence with the trustee that he had power to convey the lands free from incumbrances.

On Sept. 27th, 1873, a settlement was executed on the marriage of Florence M'Carthy with Jane Mary Downing, by which, after reciting that Florence M'Carthy the settlor was entitled to the lands of Drishane, Shantullagh, and English Island, subject to and charged with a sum of £5000 payable to his sisters Kate and Louisa M'Carthy, with interest at the rate of 5 per cent. per annum, and to certain other lands therein mentioned, and to certain policies of assurance on his life, the settlor conveyed all the said lands to trustees (subject as to the lands of Drishane, Shantullagh and English Island, as thereinbefore mentioned), upon trust to pay the rents and profits thereof to the settlor for life, and after his death to the said Jane Mary Downing for life, and after the death of the survivor upon trust for the child or children of the marriage for such estates and in such manner as the settlor should by deed or will appoint, with remainders over in default of issue. The policies of assurance were assigned to the trustees upon corresponding trusts.

There was one child issue of the marriage, Maria Louisa Bernadotte M'Carthy, born on September 7th, 1874.

On March 1st, 1876, Florence M'Carthy mortgaged the lands of Ardagh to Miss Mary Kavanagh to secure repayment of the sum of £1500. This mortgage was prepared by Messrs. Casey and Clay, solicitors for Florence M'Carthy and for Miss Mary Kavanagh, and contained in addition to the usual covenants a covenant by the mortgagor that all the debts of Daniel M'Carthy and all the legacies created or charged by his will had been paid and satisfied, and that no part thereof was charged or chargeable upon the said lands.

On Nov. 16th, 1878, Florence M'Carthy mortgaged the lands of Ardagh to the Bank of Ireland as a continuing security, to the extent of £7000. This mortgage contained a recital that the lands were subject only to Miss Kavanagh's mortgage for £1500; and on June 12th, 1878, a statutory declaration had been made by Florence M'Carthy that all the legacies and charges created by his father's will had been paid and satisfied, and that there were no charges on the lands but the £1500 above mentioned.

On July 14th, 1879, Florence M'Carthy died, having made his will, dated September 5th, 1876, whereby he directed that the sum of £5000 which was due and owing to his sisters Kate and Louisa M'Carthy under the provisions of his father's marriage settlement and his will should not be paid off unless and until his sisters should so require, and that as long as the said sum of £5000 or any part thereof should be allowed to remain outstanding that the interest thereof should be paid out of his unsettled estate. He further directed that the said sum of £5000 or any part thereof of which payment should be required should be paid off and discharged out of his estate put in settlement on his marriage, and in the event of his settled estates being insufficient to pay the said sum, or in the event of their not being subject to the payment thereof or of any part thereof he directed that his executors should have power of sale or mortgage of his unsettled estate to raise sufficient to pay off the same. He empowered his executors to carry on his brewery as long as they thought fit, and directed that Daniel M'Cartie of Skibbereen should continue manager thereof. He devised and bequeathed to his sisters Kate and Louisa M'Carthy the lands of Ardagh in equal shares, freed and discharged from the mortgages charged, or to be charged thereon by his late brother Gerald or by himself, and

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indemnified against payment thereof out of the residue of his unsettled estates, and directed that his executors should by sale and mortgage of the said residue of his unsettled estates raise sufficient to pay the said mortgages. He then directed his executors to hold all the residue of his said estate, real, freehold, chattel, of every nature and kind, to and for the use of his daughter Maria Louisa Bernadotte M'Carthy upon her attaining the age of twenty-one years or day of marriage, whichever should first happen, upon trust to pay the income thereof to her for life, and after her death in trust for her children in manner therein mentioned, and with remainder over in the event of his daughter dying under the age of twenty-one years and unmarried, in trust for his sisters Kate and Louisa M'Carthy and Margaret Martyn. He appointed his daughter residuary legatee, and his sisters Kate and Louisa her testamentary guardians, and nominated his manager Daniel M'Cartie and Daniel Donovan his executors. His will was proved by his executors on October 1st, 1879. Jane Mary M'Carthy, his wife, predeceased him.

On 1st December, 1879, Maria Louisa Bernadotte M'Carthy was made a ward of Court, and proceedings were directed to be taken to have the trusts of her father's will carried out under the direction of the Court, and accordingly on 11th December, 1879, this action was instituted in the name of Maria Louisa Bernadotte M'Carthy by Kate M'Carthy, her next friend, against the said Daniel M'Cartie and Daniel Donovan, to have the trusts of the said will carried out, and the real and personal estate administered.

On the 21st October, 1879, a joint affidavit was made by Kate and Louisa M'Carthy for the purpose of having the said Maria Louisa Bernadotte M'Carthy made a ward of Court. In it the incumbrances affecting the property of the minor were stated as follows:—"1. A charge of £5000 affecting the lands comprised in the settlement of 27th September, 1873. 2. By the will of the minor's father the unsettled property thereby devised was charged with the amount of the charges and incumbrances affecting certain lands of Ardagh thereby devised to us; the amount of such incumbrances is £5000 or thereabouts. 3. A mortgage of £1500 to the late Miss Mary Kavanagh."

A receiver was afterwards appointed over the lands of Ardagh, and over the lands of Drishane, Shantullagh, and English Island,

and on 14th March, 1884, an order was made by the Court fixing the priorities of the incumbrances on the said lands. For the purpose of obtaining this order an affidavit was made by Mr. Robert Casey, solicitor for the guardians of the minor, in which he set out the incumbrances affecting the real and leasehold estate of Florence M'Carthy as follows:—"1. Mortgage upon Drishane and other lands, dated the 8th June, 1872, for £2000 at 5 per cent. to the representatives of the Rev. Michael O'Hea, and vested in the Misses M'Carthy; interest due thereon, £300. 2. Mrs. Kavanagh, the 1st March, 1876, on lands of Ardagh East, and other lands for £1500; interest due thereon, £105. 3. Bank of Ireland second charge on lands of Ardagh East only, for £7000; interest not known, but believed to be about £1500. There is also a charge to secure a running account."

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Interest was paid on the said mortgages by the receiver accordingly. Daniel M'Cartie continued to manage the brewery and house property in Skibbereen, and paid Kate and Louisa M'Carthy interest at the rate of 5 per cent. on the £1000 and £2000 due to them under their father's marriage settlement and will, respectively, which payment Louisa M'Carthy stated in her affidavit was continued down to 1886.

The mortgage deed of the 8th June, 1872, meantime had been deposited with the Bank of Ireland by Kate and Louisa M'Carthy to secure their acceptances to the drafts of Florence M'Carthy for £700 and £1100.

In 1888 the bank pressed for payment of the acceptances, and the lands secured by the mortgage having become the property of the minor under her father's marriage settlement, her guardians, Kate and Louisa M'Carthy, applied in the minor matter, through their solicitors, Messrs. Casey & Clay, to have the mortgage paid off out of funds in Court, to which the minor was entitled under the said settlement. The application was grounded on an affidavit of Mr. Robt. Casey, who was a relative of Kate and Louisa M'Carthy, and had acted as their solicitor since the death of their brother Florence, filed January 4th, 1888, in which he declared that the sum of £5000, to which the lands of Drishane, Shantullagh, and English Island were stated in the settlement to be subject, was made up of the sum of £2000, secured by the said

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mortgage, and of the sum of £3000, which latter sum represented the share to which Kate and Louisa M'Carthy were entitled under their father's settlement and will, and that the said mortgage for £2000 was the only charge on the said lands; he further stated, that the lands could sell, in ordinary times, at fifteen years' purchase, for a sum of about £3616, which would leave a larger margin than if a sale were then pressed by the bank, in which event the minor's interest in the land would be sacrificed, and that it would be for the benefit of the minor if the mortgage were paid off out of the funds in Court. Accordingly, on January 23rd, 1888, the Court made an order, that a transfer of the mortgage should be taken to a trustee for the minor, and that the sum of £1833 6s. 8d. be applied in paying the balance due, namely, £1461 5s. 8d. to the Bank of Ireland, and the residue to Kate and Louisa M'Carthy, and, in pursuance of the said order, Kate and Louisa M'Carthy, by deed dated April 30th, 1888, assigned the said mortgage to the Rev. John O'Hea as a trustee for the minor.

Kate M'Carthy died in 1889, having by her will bequeathed all her property to her sister Louisa M'Carthy, who took out probate.

In 1892 an order was made by the Court giving leave to the Bank of Ireland, to whom the carriage of proceedings had been transferred, to sell the lands of Ardagh to tenants, under the Land Purchase Acts, and the sale was carried out in the Irish Land Commission. In the final schedule of incumbrances Miss Kavanagh's mortgage of March 1st, 1876, for £1500, was stated to be the first incumbrance on the lands sold, and the mortgage of November 16th, 1878, to the Bank of Ireland, for £7000, was stated to be the second incumbrance.

On February 13th, 1894, Louisa M'Carthy filed an objection to the schedule, claiming priority for the sum of £2000, being the amount of the legacies bequeathed to herself and her sister Kate, under her father's will, as a charge on the lands prior to the said incumbrances.

The objection came on for hearing in the Land Commission on July 2nd, 1894, when an order was made transferring the funds in that Court to the credit of the administration action and separate credit of the lands of Ardagh, and the guarantee deposits retained

by the Land Commission were ordered to be registered in the title of the said matter, pending the decision of the Master of the Rolls as to the claim of Louisa M'Carthy upon the said funds.

The solicitor for the bank in his affidavit in support of the motion submitted that the legacies were not charged on the lands of Ardagh by the will, and that, even if they were originally so charged, they had ceased to be a charge, by reason of the fact that the personal estate of Daniel M'Carthy at the time of his death was sufficient to pay them, and that the legatees had abandoned any claim they had against the lands of Ardagh, Drishane, Shantullagh, and English Island, or other lands in the possession of their brother Florence, and had accepted his personal liability instead, and he relied on the facts above stated, and especially the transaction in 1888, as to the transfer of the mortgage to a trustee for the minor, showing that if they then had a charge for the amount of their legacies on the lands comprised in that mortgage, the statement in the affidavit of Robert Casey, their solicitor, that the mortgage for £2000 was the only charge on the lands, would not have been correct, and that it would not have been for the benefit of the minor to pay off the mortgage, and take a transfer thereof, if the legacies were charged on the lands as well as the mortgage debt. He also relied on the circumstance that no interest had been paid to the legatees out of the rents of any of the lands, and that any interest which they had received was paid out of the profits of the brewery by Daniel M'Cartie, the executor of Florence, and manager of his business, and contended that the claim was barred by time, and by the *laches* and acquiescence of the legatees.

Louisa M'Carthy, on the other hand, in her affidavit denied that she or her sister had ever abandoned their claim upon the lands under their father's will, or accepted their brother Florence's personal liability instead, and denied any knowledge of, or responsibility for, the affidavits of their solicitor in 1884 and 1888, and asserted that he had assured them of the priority of their claim. She also stated that they knew nothing of Florence's statutory declaration in 1878, and that the reason they had taken the mortgage in 1872 from Florence M'Carthy was because they had at the request of their mother's executor allowed him to use the moneys coming to them under her will in the brewery business, which their brother after-

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wards carried on, and that this had nothing to do with their father's will. She did not admit that her father's personal estate was sufficient at the time of his death to pay the legacies, but this was admitted during the argument.

O'Connor, Q. C. (R. E. Meredith, Q. C., and J. Herbert Shaw, with him), in support of the motion :—

1. Upon the true construction of the will of Daniel M'Carthy the lands of Ardagh were not charged with the legacies to his daughters. Lands specifically devised are not subject to a general charge of legacies, unless it is manifest that the testator intended that they should be subject to it. Here the words, "subject as aforesaid," occurring in the subsequent devise to Florence M'Carthy of other lands of the testator, which in fact constituted the residue of his lands, made it clear that those lands were chargeable with the legacies ; but those words do not occur in connection with the lands specifically devised to Gerald M'Carthy, which it was intended that he should take free : *Spong v. Spong* (1), *Conron v. Conron* (2), and *Campbell v. M'Conaghy* (3), support this view ; the fact that in those cases the general charge came after the specific devise makes no difference—the latter portion of the will should prevail. If the contention on the part of Miss M'Carthy is correct, everything which the testator possessed, from his furniture to his jaunting-car, would be charged with these legacies, but that cannot have been his intention. *Maskell v. Farrington* (4), and *Mannox v. Greener* (5), were cases where there was a charge of debts.

2. Even if the legacies were charged on Ardagh, they were only so charged in the event of the personal estate and effects of the testator being insufficient at the time of his death, and it is clear from the residuary account that the personal estate and effects were sufficient at that time. The fact that they may now be insufficient, which is not shown, does not make any difference, as the time for ascertaining the sufficiency must be at the death of the testator, or within a year after. In *Richardson v. Morton* (6),

(1) 1 Dow & C. 365 ; 3 Bli. (N. S.)

(4) 3 D. J. & S. 338.

(2) 7 H. L. Cas. 168.

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(5) L. R. 14 Eq. 456.

(3) Ir. R. 6 Eq. 20.

(6) L. R. 13 Eq. 123.

Lord Romilly so decided: the decision of Hargreave, J., in *Massy's Estate* (1), is no doubt the other way. Monroe, J., in *Bradford's Estate* (2), followed *Massy's Estate* (1), but there the distinction existed, which is pointed out in *Richardsou v. Morton* (3), that the executor who caused the devastavit and the devisee were the same person.

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3. The words of the codicil are not sufficient to charge the additional legacies on Ardagh.

4. Even if the legatees had a charge on Ardagh, the facts of the case show that they abandoned their security and looked to Florence M'Carthy to pay them, and they cannot now, after such a lapse of time and having regard to their conduct and *laches*, insist that the charge still subsists. The will of Florence M'Carthy is inconsistent with his sisters having a charge on Ardagh. If they had a charge on it, there was no need for him to provide for payment of interest on their legacies out of his unsettled estate, of which Ardagh formed part.

William Lawson, for Mrs. Kavanagh. [He supported the contention of the bank, and referred on the question of the Statute of Limitations to *Steward v. England* (4).]

Ronan, Q.C., and *Matthew J. Bourke*, Q.C. (*P. D. Fleming*, with them), for Miss M'Carthy:—

1. There is in this will not merely a charge of legacies, but there is a devise of all the testator's property upon trust to pay legacies out of it. The order in which the charge of legacies and the specific devise of lands come in the will is very material: see the opinion of Lord Cranworth in *Conron v. Conron* (5), and *Cornwall v. Saurin* (6). There was a clear intention to charge Ardagh, as well as the lands devised to Florence; the words "subject as aforesaid" are merely words of reference and could not in themselves create a charge. [They also on this point referred to *Alcock v. Sparhawk* (7), *Preston v. Preston* (8), *Dormay v. Borradaile* (9), *Bailey v. Bailey* (10).]

(1) 14 Ir. Ch. R. 355.

(2) [1895] 1 Ir. R. 251.

(3) L. R. 13 Eq. 123.

(4) [1895] 2 Ch. 100, 820.

(5) 7 H. L. Cas. 190.

(6) 17 L. R. Ir. 595.

(7) 2 Vern. 228.

(8) 2 Jur. (N. S.) 1040.

(9) 10 Beav. 263.

(10) 10 Ch. D. 269.

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2. *Richardson v. Morton* (1), is the only authority in favour of the bank's contention: *Humble v. Humblé* (2), *Howard v. Chaffers* (3), *Massy's Estate* (4), and *Bradford's Estate* (5), are all in our favour. If Lord Romilly's decision is correct, the legatees here would have no charge on the lands devised to Florence. Besides it is not shown that there was any devastavit by the executors of Daniel M'Carthy. Florence got possession of all the property, and he could not deny his liability if he were alive, and his mortgagees can be in no better position.

3. The legacies given by the codicil are equally charged, as they are expressly declared to be "subject to the same conditions" as those given by the will.

4. On the facts of the case, the legatees are not responsible for the acts of their solicitor, and there is nothing to show that they ever abandoned their right to resort to the lands; they were paid interest up to 1886, so no question of the Statute of Limitations can arise. [They referred on this point to *Chinnery v. Evans* (6) and *Roddam v. Morley* (7).] *Steward v. England* (8) is not in point.

J. Herbert Shaw, in reply:—

On the first point *Cornwall v. Saurin* (9) is not in point; in that case there was a devise on an express trust; here there was a direct devise of Ardagh to Gerald, and not to the executors.

[On the second point he referred to Theobald on Wills, p. 670, where *Richardson v. Morton* (1) is considered to be the law.]

As to the Statute of Limitations there was no payment out of the real estate to keep the charge alive. [He referred to *Putnam v. Bates* (10), *Fordham v. Wallis* (11), *Dickinson v. Teesdale* (12), and *Coope v. Cresswell* (13).] Miss M'Carthy took the benefit of the order of 1888 for payment off of her mortgage, and she cannot be heard to say that she had any other charge on the lands than that stated in the affidavit of her solicitor.

(1) L. R. 13 Eq. 123.

(2) 2 Jur. 696.

(3) 2 Dr. & Sm. 236.

(4) 14 Ir. Ch. R. 355.

(5) [1895] 1 Ir. R. 251.

(6) 11 H. L. Cas. 115.

(7) 1 De G. & J. 1.

(8) [1895] 2 Ch. 100, 820.

(9) 17 L. R. Ir. 595.

(10) 3 Russ. 129.

(11) 10 Hare, 217.

(12) 1 De G. J. & S. 52.

(13) L. R. 2 Ch. 112.

THE MASTER OF THE ROLLS :—

This application by the Bank of Ireland raises the question whether the lands of Ardagh now represented in part by a sum of £3957 19s. 9d. stock, and £585 4s. 2d. cash in Court, are charged by the will of Daniel M'Carthy, deceased, with the payment of the legacies bequeathed by him, and, if so, whether that charge subsists in favour of Miss Louisa M'Carthy as against and in priority to the bank who are mortgagees of the same lands. The facts of the case are stated in the affidavit of Mr. Malcolmson, filed 5th December, 1895. [The Master of the Rolls read from the affidavit.] Miss Louisa M'Carthy made an affidavit in reply to this, which it is not necessary for me to read now. The will of Daniel M'Carthy is dated 26th July, 1859, with three codicils to it, only one of which, dated 11th June, 1860, is material to the present case. The testator died on 4th November, 1860, and probate was granted on 19th January, 1861.

There are thus four points raised for determination, viz.: 1. Are the legacies in the will charged upon the lands of Ardagh in any event whatever? 2. If so, are the additional legacies in the codicil similarly charged? 3. If they are charged at all, does the charge take effect, the chattel property, money, and effects having been admittedly sufficient to pay them if realized at the testator's death or within a year afterwards? 4. If otherwise well charged, has the charge been lost by the Statute of Limitations, or by *laches* or by negligence on the part of the legatees?

The first question is the main one; for if it be answered in the negative the others do not arise.

The duty of the Court in this, as in most other questions upon wills, is first to ascertain what the testator really meant by the language he has used, and then to see if there be any legal objection to giving effect to this intention. A settled and defined rule of construction of general application may impose upon the Court, as matter of legal compulsion, the duty of attaching to particular words a sense which it may not believe to be that in which the testator used them. That is a "legal objection" within the meaning of the rule; but when no such "legal objection" exists the task is one of mere interpretation.

In the present case the testator has said that the "said several
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 1896. "real and personal estates"; Ardagh was part of his real estate;
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v. in the specified event. But then Ardagh is specifically devised
M'CARTIE. by the will, and it is said there is a rule of construction having
 the effect of a rule of law, that general words charging legacies
 upon real estates will not charge real estate specifically devised,
 but only real estate not specifically devised; and if there be in
 fact no such residuary realty, the words of charge must be under-
 stood as intended to affect any lands which the testator might
 afterwards acquire.

In the present case it is admitted, and, even if not admitted, I have, in the proceedings in the administration suit to administer the assets of Florence Daniel M'Carthy who was the heir-at-law of Daniel M'Carthy, judicial knowledge or at least good reason to believe, that Daniel M'Carthy had at his death no real estate except that which he specifically disposed of by his will; and so if the bank be right there would never have been any charge on realty at all. The question therefore is whether there is any such general rule applicable to the present case.

Now, apart from authority, it seems to me quite clear that the testator did mean in the specified event to charge his lands, even though specifically devised. Taking the will at and up to the point at which the words of charge occur, we find first a general devise to the executors, as such, of all his estates real and personal, upon the trusts following. Then comes a direction to pay his debts out of rents, followed by a number of specific and pecuniary legacies, by the appointment of £2000 for younger children under his settlement, and by the gifts in question. Up to this point there could be no doubt or difficulty. After all this, the testator gives a specific part of his lands to one of his sons with remainders over, and another part, in reality all the rest of his lands, to his other son, with similar remainders over; and the will contains no gift of residuary real estate (of which there was none), though it does contain a regular appointment of his eldest son as residuary legatee. On what did he think he was charging the portions for his daughters in the event of his personalty proving deficient if not upon what he says, his real estate? (The words "and per-

sonal" in this context are insensible and have obviously been used without remembering what had gone before.) I see nothing contrary to good sense in construing the charge upon all his real estate, none of which was up to that point dealt with at all, as a paramount direction affecting and controlling his subsequent disposition of the lands which his sons were to take, whether operated with a liability to legacies, or freed from it by reason of the sufficiency of the primary fund for their payment. In this will the universal devise of the realty in trust, no ultimate trust being declared of any lands save those devised to the two sons, shows that the testator was not contemplating the existence of any residuary realty, actual or possible, as to which he would or might have died intestate, nor is there the least trace of any notion on his part that the charge would be illusory.

Of course the construction might be very different where a testator first makes specific devises of parts of his real estate, and afterwards charges his real estate in general terms with payment of legacies. There the real estate referred to may well have been intended to include only what is left after effectuating the previously expressed intention as to specific lands. I shall consider the cases on this point presently. But, apart from them, no one knowing the circumstances of the testator and reading the will in the ordinary sense of the words used would doubt as to its meaning.

Besides this, there is a very special circumstance in this will confirming, I might almost say demonstrating, that the lands specifically devised were meant to be charged. I refer to the words "*subject as aforesaid*" connected with the gift of the other lands to Florence M'Carthy. Admittedly that phrase means subject to the legacies in the specified event. Mr. Malcolmson's affidavit expressly states this. But how could the brewery premises, &c., be subject to the legacies as aforesaid, unless they were comprised in the real estates charged? "*Subject as aforesaid*" are mere words of reference, and are always so used. True they do not occur in reference to the lands of Ardagh; probably they were accidentally omitted in that context. If the lands were charged they were unnecessary. I regard it as impossible to construe them as I am asked to do, in the sense of imposing

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anew, and as a distinct charge, a liability upon the brewery and other lands, which but for them would have been exempt. That is not the way in which a new charge would be imposed. Had that been intended, we should have found words of the present tense, operative words, purporting to carry out the intention. "Subject as aforesaid" admittedly is the same as "charged with legacies as aforesaid." But the brewery and all the other valuable properties and estates comprised in this devise are not charged as aforesaid except by the words which charged all the real estate. All the real estate, therefore, was meant to include the lands specifically devised to the eldest son. If so, it is impossible to escape from the contention that the charge extends to all real estate, even specifically devised. This circumstance is decisive of this branch of the case on the question of what the testator meant. Taken in connection with the previous general gift of all the realty to trustees upon the trusts of the will, and with the absence of any residuary devise, I regard it as decisive on the question of actual intention. Is there, then, any legal objection to my so holding?

The authorities relied on by Mr. O'Connor were the well-known cases of *Spong v. Spong* (1), *Conron v. Conron* (2), and also *Campbell v. M'Conaghy* (3).

In *Spong v. Spong* (1), the clause charging legacies came after the specific devises, and was followed by a residuary devise of real estate, and there was in fact realty which passed under it. Sir Richard Bethell in arguing *Conron v. Conron* (2), drew attention to the fact that in the report of *Spong v. Spong* (1), in Bligh, the residuary clause on which the case chiefly turned was omitted. It is true it was omitted in the statement of the will (it appears at length in Dow and Clark), but it is pointedly stated, and in its very words in the judgment of Lord Manners (I read from p. 105):—"It appears that there was some real property of the testator which passed under the residuary devise, and in this case Thomas Spong, the specific devisee under the will, has appealed from that part of the decree which makes liable to the satisfaction

(1) 3 Bligh (N. S.) 84; 1 Dow & Clark, 365.

(2) 7 H. L. Cas. 168.
(3) Ir. R. 6 Eq. 20.

of the pecuniary legacy the property devised by the will." The general proposition is then laid down :—" Upon the report of the case it seems that the Lord Chief Baron has laid down a proposition which appears to have pervaded the whole of his argument, and to have governed his decision, and which is to this effect, namely, that there is no difference between a specific devise of a particular estate and a residuary devise of a real estate, and that a general charge of pecuniary legacies upon real estate as it would affect a residuary devise so it would affect a property specifically devised ; for as to real estates they are in their nature specific devises, and if a legatee has a right to resort to the one he has equally a right to resort to the other. Upon this proposition the whole case rests. Now I confess I cannot concur in this proposition. There is not much authority in the books upon the subject, but I think there is a marked and obvious distinction between property specifically devised and real estate which passes under a residuary clause. In the first case a testator by specifically devising or specifically bequeathing any part of his property, intends as between the objects of his bounty to separate that part of his property from the rest, and that it should not be subject to the provisions and operation of his will. Whereas in a residuary devise as in the present case it is quite the reverse. The devisee must take it subject to all the provisions and incumbrances charged upon the land. In the one case the devisee takes the specific thing devised, in the other case the residuary devisee takes such part of the real property as shall remain after satisfying the charges and incumbrances affecting the real estate. The cases therefore appear to me to be most materially different. By the general rule a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule applicable as to a residue."

Lord Manners refers to the question to which I have already adverted, namely, the order in which the devises and charging words occur in the will. At page 106 he says :—" Mr. Sugden, in his argument contended, that if the testator had at the outset of his will charged his debts and legacies upon his real estate, and had then given specific devises, and specific bequests, and also pecuniary legacies, the pecuniary legatees would, in case other

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funds were deficient, have a right to resort to the property specifically disposed of. I do not concur in that opinion. It, certainly, was not the opinion of Lord Alvanley, who, in three different instances, stated his opinion as to the distinction between creditors and legatees under such circumstances. In the first case, of *Kightley v. Kightley* (1), in 1794, Lord Alvanley makes that distinction. Afterwards, in the case of *Shallcross v. Finden* (2), in 1795, he persists in that distinction, and in the case *Keeling v. Brown* (3), in the year 1800, he continues to distinguish between creditors and legatees in respect of such charges." And, again, at p. 109, he continues:—"With respect to the case put by Mr. Sugden, although I may say I do not agree with him, and, that I think Lord Alvanley was not of that opinion, perhaps the best, and most satisfactory answer that I can give to Mr. Sugden is, that the testator in this case has not so done as he represents."

It must be admitted that the opinion of Lord Manners was apparently adverse to the inference in question, though it is to be observed, that in the first of the two passages, at least, the point is somewhat mixed up with the different one as to the effect of a charge of both debts and legacies, and the report in Dow and Clark does not contain either of the passages, save, perhaps, the first; and in reference to it, the only point noticed is the question of the effect of charging debts as well as legacies (see p. 108).

In *Conron v. Conron* (4), the facts were stated by the Lord Chancellor (Lord Chelmsford), to be undistinguishable from those in *Spong v. Spong* (5), on the authority of which it was decided. In the judgment of Lord Cranworth, however, is to be found an expression which would limit the decision of the House, as a decision, to cases in which the specific devises come first. At p. 190 he says:—"A general charge 'on all my real and personal estate,' must be read as a charge on all which I have not otherwise disposed of. And, probably, no violence is done to the language, for the testator may not consider what he has already devised or bequeathed as property coming under the description of part of 'my estate.' The question must always be one of

(1) 2 Ves. Jun. 328.

(2) 3 Ves. 739.

(3) 5 Ves. 359.

(4) 7 H. L. Cas. 168.

(5) 3 Bligh (N. S.) 84; 1 Dow & Clark, 365.

intention, but the rule is, that the presumption is against an intention to charge lands specifically devised, and, that a mere charge 'on all my lands' is not sufficient to rebut that presumption." Indeed this reasoning in this passage, necessarily so limits it. In neither *Spong v. Spong* (1), nor *Conron v. Conron* (2), was there any general gift of the entire estate, real and personal in trust as here, nor anything akin to the words, "subject as aforesaid." Thus, neither of these cases, nor any other in the books, rules this present in terms. In *Campbell v. M'Conaghy* (3), the question was, whether, under the terms of the will, the general legacies to the plaintiff and others were well charged on the lands specifically devised. There was in that case a residuary legatee, but no residuary devisee. The Vice-Chancellor held that there was nothing to take the case out of the ordinary rule laid down in *Spong v. Spong* (1) and *Conron v. Conron* (2), and that, consequently, the general legacies were not charged on the specific bequests. He there says:—"The presumption is against general legacies being charged on specifically devised lands, or upon specific legacies, and it requires words clearly expressed of a contrary intention to rebut that presumption. The argument of the plaintiff was, that the testator had no other lands than those he had specifically disposed of, and that there were, therefore, no other lands for the charge to attach to, and that, consequently, it would attach to these, and with them to all the other property coupled with them. But there are two answers to this argument: first, that he might have subsequently acquired other lands, on which his will would operate, and, secondly, that it was quite possible that the gifts of the lands he mentioned might have lapsed, and the lands then become undisposed of."

The first argument may be used in every case; the second, that of lapse, I cannot regard as applicable to the present case. There would be no lapse of the lands of Ardagh until events had arisen in which the devise of those lands not only to Gerald and Florence M'Carthy, but also to the testator's daughters and their children would have failed.

But how does the argument founded on the order in which

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(1) 3 Bligh (N. S.) 84; 1 Dow & Clarke, 365.

(2) 7 H. L. Cas. 168.

(3) Ir. R. 6 Eq. 20.

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the different provisions in the will occur stand in point of authority? I have already referred to the opinion of Lord Manners on the point. This, however, must be taken to be very much weakened in effect, if not entirely removed, by the view and reasons of Lord Cranworth in the passage I have read. In *Mannox v. Greener* (1), and in two Irish cases the question has been the subject of judicial consideration. In *Mannox v. Greener* (1), Malins, V.-C., says:—"Now I think that all these cases must depend on the particular form of the will; and it seems to me to make a most marked difference whether a man begins by making a charge upon all his property, or whether he begins by making a specific devise or bequest, and then charges his property, because, when he has made a specific devise or bequest, and then proceeds to charge his property, it may well be that he means 'all that property which I have not already by any will disposed of,' and accordingly I think this case falls within the decision of Lord Westbury in *Maskell v. Farrington* (2), where these two cases of *Spong v. Spong* (3), and *Conron v. Conron* (4), were pressed upon him."

In *Quain v. Harvey* (5) there was a charge of debts and funeral expenses in the will as well as of an annuity. The charge of debts of course is stronger, since without any words of charge lands even specifically devised are equitable assets for their payment. But the principle is discussed by the Master of the Rolls apart from that point, p. 625, and his opinion founded on the expressions in *Mannox v. Greener* (1), and *Maskell v. Farrington* (2), is in favour of the view I have stated. Sir Edward Sullivan there says:—"Where a man makes a specific devise in the first instance in clear terms to a person, he indicates that that person shall take the property as it is given, and when the testator has other real estate, and he subsequently charges all his estates in general language with his legacies, as was the case in *Conron v. Conron* (4), it is in accordance with principle to hold that he did not intend to include in the charge the subject-matter of the specific devise. But if he charges his estates in the first instance with debts and

(1) L. R. 14 Eq. 459.

(4) 7 H. L. Cas. 168.

(2) 3 D. J. & S. 338.

(5) 5 L. R. Ir. 622.

(3) 1 Dow & Cl. 365.

legacies, and afterwards makes a specific devise of a portion of them, it is as reasonable to suppose that he gave it *cum onere*. In *Conron v. Conron* (1) the devise was first and the charge last, and that distinction is pointed out in *Mannox v. Greener* (2). In *Maskell v. Farrington* (3), which was cited in the argument, the distinction was also recognised and acted on by Lord Westbury. It was contended in that case, where a man by his will charged his debts and funeral and testamentary expenses on the whole of his real and personal estate in the first instance, that the principle of *Spong v. Spong* (4), and *Conron v. Conron* (1), applied to exempt the subsequent specific devise from contribution thereto, but Lord Westbury thought the case too clear for argument, and put these cases aside, and decided that they had no application. Where a man charges his debts and legacies on all his property in the first instance, it is in the abstract most reasonable to suppose that everything which he gives afterwards is to bear its share of them."

It must be observed that *Maskell v. Farrington* (3) was apparently decided solely on the ground that debts were charged along with legacies, and as the debts were admittedly charged upon the specifically devised lands so must the legacies be; and no reference is made either in argument or in the judgment to the order of the provisions in the will.

In *Cornwall v. Saurin* (5), in the Court of Appeal, the charge of an annuity (on which the question turned) was created by a general devise of all the testator's real and freehold and leasehold estates in trust to pay the annuity. In this circumstance it bears some resemblance to the present case; but its chief bearing on the present case arises from the opinion of the Court of Appeal expressed by Naish, L.-C., as to the grounds on which *Spong v. Spong* (4) and *Conron v. Conron* (1) were to be distinguished. He says:—"The other question however which appears to have been the principal question determined is whether the annuity of £120 a-year, which was given by the testator in this case for the benefit of his son Mathew and his daughters, is charged on all the testator's

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(1) 7 H. L. Cas. 168.

(2) L. R. 14 Eq. 456.

(3) 3 D. J. & S. 338.

(4) 1 Dow & Cl. 365.

(5) 17 L. R. Ir. 595.

M. R. property, or merely on the real, freehold, and personal property
 1896. not specifically devised by him. We were very strongly pressed
M'CARTHY by Mr. Madden and Mr. Trench with the cases of *Spong v.*
v.
M'CARTIE. *Spong* (1) and *Conron v. Conron* (2), and if these cases were on all
 fours with the present, we should, of course, decide similarly here.
 But it appears to us that there is a very material distinction
 between this case and those. In those cases there were specific
 devises of lands, and after that general pecuniary legacies, and then
 a residuary gift. We all know what is the nature of a general
 pecuniary legacy. It is a legacy which is paid out of the undis-
 posed of personal estate. If the legacies were first given, and
 then a residuary devise of lands, they would be a charge on
 them."

I must therefore take it now that the weight of judicial
 opinion is in favour of the proposition that when legacies are by
 a will charged upon all the testator's real estate, and the will
 afterwards goes on to dispose specifically of parts of the realty,
 the charge will, in the absence of anything to lead to a contrary
 conclusion, attach upon the lands specifically devised, although
 the present is the first case in which it has arisen for decision. In
 the present case there is certainly nothing to lead to a different
 conclusion as to the intention of the testator, but much to confirm
 it. There is the general devise in trust, and there is the fact that
 the testator had no real estate except what was specifically devised.
 There is the specific gift of part of the lands, "subject as afore-
 said." There is no residuary devise. I have no doubt that the
 testator intended the lands left to his sons to be an ultimate
 security for the fortunes of his daughters.

I may add that if the words "residuary legatee" in this will
 could be held to mean residuary legatee and devisee (which was
 not argued), it would not in any degree lessen the confidence I
 feel in the propriety of the view I have arrived at on a different
 assumption.

The next question is as to the sums of £300 each bequeathed
 by the second codicil. Are they charged in the same way as the
 legacies in the will? I am of opinion they are. The words are

(1) 1 Dow & Cl. 365.

(2) 7 H. L. Cas. 168

“In addition”—“Further sum”—“To be subject to the same conditions”—“as the fortunes I have already left them.” These sums were additions to the fortunes already given and subject to the same conditions. They are payable out of the same funds: see *Leacroft v. Maynard* (1), *Johnstone v. Lord Harrowby* (2).

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But it is said that the Statute of Limitations bars the claim so far as the lands are concerned. Admittedly the payments of interest have kept it alive as against personalty. The point was not argued, though mentioned in a casual way. There is no substance in it. While the legacy is a subsisting claim, capable of enforcement, there can be no ground for holding that the lands charged with it are not to be resorted to. But I need not discuss a point not argued. *Laches* is a different question. I am, however, unable to hold that there is proof of such *laches* as should transfer the property of the legatees to the bank. I expressed my opinion on the effect of the affidavit and conduct chiefly of Mr. Casey on this point during the argument, and shall not stop now to wade through the voluminous documents referred to in the affidavits in detail. I do not think that the formal covenant for title to other lands by Florence M'Carthy the mortgagor in the deed of 8th June, 1872, binds Louisa M'Carthy to admit that she had no claim to indemnity against the lands of Ardagh, which are not comprised in it, and which did not belong to Florence M'Carthy till years after. Mr. Casey, whose connexion with the case was not solely of a professional sort, no doubt either did not know or had forgotten that the lands of Ardagh were charged with legacies, which might or might not have to be raised out of them. The title had not been the subject of decision in the suit. The bank had accepted it, and if the amount realised by the sale of the lands is less than sufficient to cover all the prior charges, there may be some loss to the bank. This however is beside the question of *laches* on the part of Louisa M'Carthy or her sister, that is, such neglect as would render it inequitable for them to assert their true title. The other matters relied on as proof of *laches* are, I think, satisfactorily met in the replying affidavit of Louisa M'Carthy. Mr. Casey, for whomsoever he acted, did not profess, nor could

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he have professed, to abandon or surrender any rights Louisa M'Carthy or her sister may have had.

The dealings of Florence M'Carthy with the bank, and the statutory declaration stated to have been made by him, cannot affect the claims of his sisters.

The remaining question is this. The legacies of Daniel M'Carthy are by his will charged upon his chattel property, money, and effects; and it is only "if the same shall be insufficient" that they become a charge upon the realty. The personal estate is now insufficient. But at the death of the testator concededly it was sufficient. Does the charge on lands take effect? There is one point blank decision that it does not: *Richardson v. Morton* (1). There a legacy to an infant with interest for maintenance till twenty-one was charged on the testator's real estate, if the personal estate should be inadequate. The personal estate was sufficient at the time of the testator's death, but was afterwards wasted by his executor. Lord Romilly held that the legacy could not, upon the infant attaining twenty-one, be made chargeable on the real estate in possession of the devisee under the will. But there are authorities the other way: *Massy's Estate* (2), decided in this country by Judge Hargreave in the year 1863, which was not cited in *Richardson v. Morton* (1), decided in the year 1871, and *Bradford's Estate* (3) decided by Monroe J., in the year 1894. In the last case it was held that, although the personal estate was originally sufficient, and the deficiency was caused by the *devastavit* of the executor, the unpaid legacies became charged on the lands. Monroe, J., there says, at page 255:—"It is clearly settled that such contention (viz. that the legatees had no charge on the land) could not be sustained even where the executor is not himself the residuary legatee, and that where the executor wastes the personal assets the legatees can, under such a will as the present, realize their charge against the lands." *Massy's Estate* (2) and *Richardson v. Morton* (1) were both cited in that case. In *Bradford's Estate* (3), as in *Humble v. Humble* (4)

(1) L. R. 13 Eq. 123.

(2) 14 Ir. Ch. R. 353.

(3) [1895] 1 Ir. R. 251.

(4) 2 Jur. 696.

and *Howard v. Chaffers* (1), the circumstance existed that the executor who had made away with or lost the assets was the devisee of the lands charged in the event of their insufficiency, and this circumstance, no doubt, renders these cases only partially applicable to the present. It formed a sort of personal estoppel. But no such question arose in *Massy's Estate* (2), which is directly in point. There a conditional order for sale of the estate having been made, cause was shown against making the order absolute, on the ground that, as there had been an adequate personal fund at the time of the testator's death, that was the only source of payment to which the legatees had a right to look. Hargreave, J., after stating the facts there, says:—"It is under these circumstances that the personal estate is insufficient for payment of the legacies, and the question is, whether the charge on the real estate" (which was charged with so much of the testator's debts and legacies as his personal estate should not be sufficient to pay) "has taken effect by reason of such insufficiency? There are authorities which establish beyond a doubt that the trusts of a term created by a testator, for the purpose of raising so much of his legacies as his personal estate should be insufficient to pay, arise and take effect, notwithstanding that the deficiency is created solely by the *devastavit* of the executor. The cases of *Humble v. Humble* (3) and *Howard v. Chaffers* (1) establish this proposition. It was contended on the part of the minor that those decisions would not have been made if it had not been for the circumstance that the defaulting executors were also devisees of the realty. On examination of the cases, it will be observed that this was not strictly the case. But, even if it had been, it would have afforded no ground for the decisions; for in such case the *devastavit* would have been a personal debt simply, and could not in those suits have been made a charge on the lands." After referring to other cases, he says:—"The principle, therefore, is established, that deficiency is conclusively proved when there is a failure to pay the legacy out of the assets; but I feel some doubt whether the petitioner might not be liable to the imputation of *laches*, in not requiring payment in, or soon after 1849, when he attained age.

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(1) 2 Dr. & Sm. 230.

(2) 14 Ir. Ch. R. 353.

(3) 2 Jur. 696.

M. R. On consideration, I have no doubt that the mere not enforcing
 1896. payment from the executor is not, for this purpose, to be regarded
M'CARTHY as *laches*. The case might be different if there had been an appro-
v. priation of assets by the executor to pay this legacy, and the
M'CARTIE. appropriated funds left in the executor's hands. This would have
 been a relinquishment of the security provided by the will for the
 personal security of the executor. The primary duty of securing
 the due administration of the personal assets devolves, under the
 will, upon the parties interested in the real estate, which is the
 secondary fund or surety for this payment, and I must hold the
 real estate responsible for the actual deficiency of the personal
 estate. I have only to add that there is no difference in principle
 between a trust term to raise the deficiency, and a charge of such
 deficiency in express terms."

I believe I am bound, as between two conflicting decisions of
 co-ordinate tribunals, one of an English, and the other of an
 Irish Court, to follow the latter. But if I am not bound to do so,
 I prefer the decision of Hargreave, J., and that of Monroe, J., on
 the point. Admitting that *Richardson v. Morton* (1) is contrary to
Massy's Estate (2) and *Bradford's Estate* (3), I conceive myself to
 be bound by the Irish decisions, even if I myself preferred the
 English one, which I do not. Upon the whole case, therefore, my
 opinion is against the contention of the Bank of Ireland, and the
 motion must be refused accordingly. As the difficulty has been
 caused by the will of the testator, the costs of the parties must
 come out of the estate.

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The Bank of Ireland appealed to the Court of Appeal (4).

May 11-13.
 June 23.

R. E. Meredith, Q.C., and O'Connor, Q.C. (J. Herbert Shaw,
with them), for the appellants.

Ronan, Q.C., and Matthew J. Bourke, Q.C. (P. D. Fleming, with
them), for Miss M'Carthy.

(1) L. R. 13 Eq. 123. (2) 14 Ir. Ch. R. 353. (3) [1895] 1 Ir. R. 251.

(4) Before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

William Larson, for Mr. Kavanagh, was not heard.

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[The following additional authorities were referred to on the first point, *Joy v. Campbell* (1); *Barry v. Harding* (2); on the second point, *Trousdale v. Hayes* (3); on the last point, *Blake v. Gale* (4), and *Leahy v. De Moleyns* (5).]

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WALKER, L. J., delivered the judgment of the Court :—

June 23.

The facts of this case, and the authorities bearing on it, are so fully stated in the judgment of the Master of the Rolls, that I refer to that judgment as my vindication for dealing somewhat briefly with the questions which we have to decide. The principal question in the case is whether the legacies given by the will and two codicils of Daniel M'Carthy to his daughters are charged on the lands of Ardagh specifically devised to his son Gerald. It is plain that the £900 given by the codicil has all the incidents of charge attached to the original legacies. It is given "in addition," and as a further sum, and is directed to be "subject to the same conditions as the fortunes I have already left them." This point, indeed, was not, as I remember, argued in this Court. At all events it is clear, I think, if *Spong v. Spong* (6), and *Conron v. Conron* (7) had never been decided, that no one could read the will of Daniel M'Carthy without coming to the conclusion that he intended by the words of charge he uses to charge for the benefit of his daughters all the lands subsequently devised to sons, and if that conclusion is forced on us it would be strange if a rule of construction adopted for the ascertainment of intention should be applied with the result of defeating it. The family of Daniel M'Carthy, who was a brewer, consisted in 1859 (besides his wife) of three daughters, an eldest son Florence, and a second son Gerald. There had been a settlement upon the marriage, under which a sum of £2000 charged on realty was made a part provision for the four younger children. He had also lands called Ardagh, and in addition brewery concerns and house property in

(1) 1 Sch. & L. 328.

(2) 7 Ir. Eq. R. 330.

(3) W. N. 1883, p. 13.

(4) 32 Ch. D. 371.

(5) [1896] 1 Ir. R. 206.

(6) 3 Bligh (N. S.) 84.

(7) 7 H. L. Cas. 168.

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 1896. Drishane, Shantullagh, and English Island.

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There would be nothing improbable in finding the legacies in question, which are described and are given as additional fortunes for the daughters charged on the lands given to sons, just as the £2000 was a charge, and it will be seen that the daughters are given interests in remainder in the lands specifically devised to each son. They are treated as equal objects of bounty, and sharers in family provisions, and all the estates real and personal of the testator are vested in trustees as a trust fund to carry out the declared trusts which include a power to apply so much of the proceeds of his estates, and so much of his personal estate, or the interest and dividends thereof, for the support, maintenance, and education of his said children, or for the forwarding in life of any of them, as they might think fit.

The gifts and dispositions which the trustees are to carry out are the following:—He first makes an appointment of the £2000 charge among his three daughters and Gerald, and then, seeing that his daughters were not sufficiently provided for, he inserts a trust and bequest for their benefit before he devises the lands among his two sons. It is as follows:—"I devise and bequeath unto my three daughters a further sum of £700, to be payable to each of them at the like rate of 5 per cent. per annum from the date of my decease, subject to the conditions, limitations, and remainders hereinbefore mentioned, as to the said sum of £2000; the said several sums of £700 to each of my said daughters, and interest thereon, to be paid and payable out of, and charged, and chargeable upon my real and personal estates." He had, up to this, made no disposition of those real estates; but he now proceeds:—"I give, devise, and bequeath unto my second son, Gerald M'Carthy, his heirs, &c., all my estate and interest in the farm and lands of Ardagh, together with a sum of £500, in addition to the legacies already bequeathed to him, which latter sum is not to bear interest," with remainder as to the lands to Florence and the daughters. The £500 legacy is not charged on the lands.

He then takes up Florence, who is dealt with last, because he gets the bulk of his lands:—"I give, devise, and bequeath unto

my eldest son, Florence M'Carthy, his heirs, executors, administrators, and assigns, subject, as aforesaid, all my estate and interest," &c., and it is said the enumeration of lands comprises all he had, except Ardagh. The words, "subject as aforesaid," are plainly referential to the charge already imposed, and it was not contended that Florence's lands were not charged with the legacies. In fact, it was admitted they would be so charged, though the words, "subject as aforesaid," were not in the clause, the contention being that the devise to Florence was a residuary devise. He does, afterwards, make Florence his residuary legatee. I do not think that the devise to Florence ceases to be specific, because it, in fact, specifies all the lands he had left after Ardagh. It was suggested that the words, "subject as aforesaid," ought to be read as imposing a new charge, but this, I think, is impossible. It was not necessary to attach them to the devise to Gerald, because that immediately followed the imposition of the charge, but when the break occurred by the devise to Gerald, they are introduced, and plainly are referable to the charge as carried on.

In my opinion the will must be read as if he had devised to Gerald the lands of Ardagh, subject to the charge in aid already mentioned—a burden which probably the testator did not consider onerous, and it seems difficult to see how Florence's lands could be treated as charged and Gerald's free.

But then it was argued that there is a settled rule of construction having now the force almost of a rule of law, which compels the Court to hold that the lands of Ardagh are not charged. It is settled that if there is in a will a specific devise or bequest, and in a later part of the will or in a codicil a general charge of legacies on all the real and personal estate, this general charge presumably does not attach on what already was specifically given away, which the testator must be supposed to intend should be enjoyed in its entirety, and I assume this would be so even though there were no lands to pass in fact under a residuary devise; but except the dictum of Lord Manners in *Spong v. Spong* (1), not necessary for the decision, there is no authority that where a general charge of legacies precedes the specific devise the same

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(1) 3 Bligh (N. S.) 84.

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 1896. is a specific devise. As Lord Cranworth points out in *Conron v.*
M'CARTHY *Conron* (1), "The question must always be one of intention, but
v. the rule is that the presumption is against an intention to charge
M'CARTIE. land specifically devised, and that a mere charge 'on all my
 Walker, L.J. lands' is not sufficient to rebut that presumption." And he also
 points out that there is nothing to prevent a testator charging
 land specifically devised, that is, as I understand, even when the
 devise preceded the general charge.

The Master of the Rolls, in his judgment, has gone elaborately
 through all the cases subsequent to *Conron v. Conron* (1), and I en-
 tirely agree with the statement of the rule laid down by Sir E.
 Sullivan in *Quain v. Harvey* (2).

It is not by any means necessary for the decision of this case
 to lay down that wherever the general charge precedes the specific
 devise the lands specifically devised are charged; the question will
 always be one of intention upon the will as a whole, and upon
 this part of the case, taking the element I have mentioned into
 account, and also the general devise or trust, and the fact of the
 second specific gift being preceded by the words "subject as
 aforesaid," I think the words of charge must have effect in
 charging the sisters' additional fortunes on Ardagh.

The next question is whether, inasmuch as at the date of the
 death and during the year after it personal assets existed suffi-
 cient to meet the legacies, a charge upon the real estate came into
 effect at all. The words of the will are, "charged and chargeable
 in the first place upon my chattel property, money, and effects;
 and, if the same shall be insufficient, then the said several sums to
 be paid and payable out of and charged and chargeable upon my
 real and personal estates." There is a direct conflict on this
 point between one English and two Irish decisions. It is impos-
 sible to reconcile that of Lord Romilly, in *Richardson v. Morton* (3),
 with those of Judge Hargreave, in *Massy's Estate* (4), and Mr.
 Justice Monroe, in *Bradford's Estate* (5).

(1) 7 H. L. Cas. 168.

(2) 5 L. R. Ir. 622.

(3) L. R. 13 Eq. 123.

(4) 14 Ir. Ch. R. 235.

(5) [1895] 1 Ir. R. 251.

It was said that the cases in which the devisees of the realty were also the executors, and wasted the assets, could not be relied upon as authorities in favour of the charge, as the devisees were estopped from setting up their own *devastavit* as an answer. I observe that Judge Hargreave does not think that circumstance makes any distinction. Be that as it may, I think the real question is, what is the true construction of the will. The legatee has two funds for payment of his legacy, and the question is whether, so far as the legatee is concerned, his rights were limited by the state of the personal estate at the death.

Judge Hargreave thought the deficiency arose when the legatee failed to get payment of the legacy in course of law, and that he was only concerned with that. Lord Romilly looked at the question from another point of view. He says—"Here a legacy is given payable out of land if the personal estate is deficient at some particular time, and if it is not deficient at that time it is immaterial that it becomes deficient afterwards; all I have to do then is to determine the time at which the value of the personal estate is to be estimated:" and he held there it was the time when the legacy was payable, and that it was payable at the death of the testator, and therefore that the condition on which the legacy was to be payable out of the land had not been fulfilled. With great respect I think Lord Romilly's construction of the will is not the true one, and it seems to me inconsistent with the construction put by Kindersley, V.-C., on a similar clause in *Howard v. Chaffers* (1). There the trusts of a term were to raise sufficient money to pay so much of the testator's funeral and testamentary expenses and debts and of the legacies given by the testator as his personal estate and effects thereby bequeathed should be insufficient to pay and satisfy. The element there existed that the devisees of the realty were also executors; but the Vice-Chancellor based his decision upon two grounds. After alluding to the first ground, he says:—"Nor is that, I think, the true construction of the will. What was the testator's intention? Did he intend that if the personal estate was sufficient at his death, and became afterwards wasted by his two sons, the executors and devisees,

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Appeal. his daughters and his grandson should not be entitled to
 1896. have their legacies raised out of the term which he expressly
M'CARTHY created for that purpose? He does not refer to the period of his
v. death. He uses general language, 'so much as his personal
M'CARTHIE. estate shall be insufficient to pay.' There is nothing in the will
Walker, L.J. to justify the narrow construction that he intended to limit the
 trusts with reference to the state of his personal estate at his
 death." So here, I think, the true construction of the will is
 that the legatee should have a charge on the realty if she failed to
 get payment out of the primary fund.

It is another question, if she is estopped by conduct or *laches*.
 In *Trousdale v. Hayes* (1), there was personal estate in existence
 which could be resorted to, and the case seems no authority for the
 point it was cited on. The view that I have taken seems to me
 borne out by the language of Vice-Chancellor Wood in *Tatlock v.*
Jenkins (2). There Catherine Tatlock devised her real estate
 to trustees upon trust by sale or mortgage "to raise in aid of her
 personal estate not specifically bequeathed (if insufficient) so much
 money as should be requisite to satisfy her debts, funeral and
 testamentary expenses, and legacies." The lands were devised, after
 making the payments aforesaid, upon trust for Mary Tatlock for life,
 and the devisee for life had power to appoint by will £5000 to any
 person, and the real and residuary estate were charged with the pay-
 ment of said £5000. By a codicil she devised all her real estates
 to Mary Tatlock freed and discharged from her debts and also from
 any charges created by her will. The question was whether
 £5000 could be raised out of the personal estate, or should abate
 proportionally. Counsel referred to *Roberts v. Walker* (3), as show-
 ing that the £5000 failed so far as payable out of real estate. The
 Vice-Chancellor said: "That is as regards the parties who take
 subject to the charge, but as regards the person interested in the
 charge is not he entitled to raise it out of either fund? Suppose
 there had been a *devastavit*, could not he raise the whole charge
 out of the real estate?" Counsel goes on—"The principle of
 the decision is that part of the charge is fixed upon one fund, part
 upon the other exclusively." The Vice-Chancellor:—"Surely not
 with respect to the person entitled to the charge."

(1) W. N. 1883, p. 13.

(2) Kay, 655.

(3) 1 Russ. & M. 732.

The third ground of defence is that the respondent is bound by her own *laches* and conduct from asserting the present claim against the lands of Ardagh. In the first place it is not alleged that there is any defence founded upon the Statute of Limitations. The testator died on the 4th November, 1860, and interest was paid by the executor to 1869, and then by Florence when he came of age, to his death on 14th July, 1879, and payments were continued by his executor down to, as Miss M'Carthy states, 1886.

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The circumstances which are relied on as amounting to, as it was said, an implied agreement by the daughters to look to the liability of Florence and his estate, and an abandonment of the security of Ardagh, are the following:—A residuary account was passed in 1863, which showed sufficient personal assets to meet the legacies. Apart from the question of law, which I have already referred to, the daughters could not be affected by this. The next matter was that Florence having in hands moneys of his sisters representing legacies from their mother gave them on 8th June, 1872, a mortgage of Drishane and other lands included in the devise to him, and covenanted that they were free from incumbrances, thus, it is said, representing he was giving a first charge. This mortgage does not affect Ardagh, and could not, I think, have any effect as an abandonment of a charge on even Drishane. Gerald was a party only as having an estate in remainder in Drishane.

I do not follow the argument founded upon the marriage settlement of Florence of the 27th September, 1873. Ardagh of course was not brought into the settlement, for it was then in the possession of Gerald as owner, and the recital seems to me to make against the argument of the bank; at all events the sisters are not bound by any statement or recital in it. Gerald died on the 19th March, 1875, and Florence then became entitled to Ardagh, and he mortgaged it to Miss Kavanagh for £1500 on the 1st March, 1876, and there is no doubt that on the 16th November, 1878, he mortgaged Ardagh to the bank, and both these mortgages proceed on the assumption that the debts and legacies and charges of the testator had been paid, and the bank mortgage is stated to be subject only to Miss Kavanagh's mortgage, and the statutory declaration of Florence of the 12th June,

Appeal. 1878, states that the debts and legacies had been paid. But the
 1896. sisters are not parties to these documents, and Louisa M'Carthy
 M'CARTHY swears she did not know of the statutory declaration.

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 M'CAETIE. There is no doubt that the affidavit of Robert Casey of the
 Walker, L.J. 5th March, 1884, stating the priority of the charges on Florence's
 estate omits altogether these legacies as charges, and this affidavit
 is only consistent with an idea that they were being met out of
 some other fund, but at all events Louisa M'Carthy cannot be
 affected by that affidavit, and she swears she did not know of it.

I do not think the affidavit of Mr. Casey of the 4th January,
 1888, supports the argument, and Louisa M'Carthy swears she
 did not know of that affidavit being made. The £5000 referred
 to there seems to include the charges. Be that as it may, Louisa
 M'Carthy is not bound by the statement.

It is quite plain I think that omission to specifically claim
 these charges out of Ardagh (the interest being paid), is not
 conduct which will affect or extinguish charges, or create an
 estoppel by conduct, where no act was done by the parties
 entitled to the lands on the faith of the delay or omissions of
 the legatees. Mere non-suing (the Statute of Limitations being
 out of the case), does not create an equity against the legatee
 in favour of the real estate. We had to consider this branch
 of the law in *Leahy v. De Moleyns* (1), and I see no reason to
 alter the opinion which I then expressed and on which this
 Court acted.

Upon the whole I think that the decision of the Master of
 the Rolls was right, and the appeal must be dismissed with
 costs.

Solicitor for the Bank of Ireland: *De Moleyns*.

Solicitors for the other parties: *Downes ; Casey & Clay*.

G. Y. D.

IN RE MEADE'S SETTLED ESTATES.

(1896. No. 956.)

M. R.
1896.

Dec. 16.

1897.
Jan. 12.

Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1—*Settled Land Act*, 1890 (53 & 54 Vict. c. 69), s. 11—*Compound settlement—Settlement made in exercise of power in will—Appointment of trustees for purposes of Acts.*

Where trustees, for the purposes of the Settled Land Acts, were appointed of a will which empowered the tenant for life to charge the settled land with pin-money, jointure, and portions for younger children, and to create a term of years for that purpose, and the tenant for life afterwards exercised these powers by his marriage settlement, it was held that the trustees of the will were not "trustees of the settlement" within the meaning of the Settled Land Acts, and that the will and marriage settlement together constituted a compound settlement, of which trustees should be appointed to enable the tenant for life to exercise the power to raise money by mortgage conferred by the Settled Land Act, 1890, s. 11.

SUMMONS.

This was an application in the matter of the Rathfriland Estates, situate in the county of Down, settled by a settlement made by the will of General the Hon. Robert Meade, dated May 13th, 1851, and an indenture dated December 30th, 1893, on behalf of Captain John Percy Meade, the tenant for life under the above-mentioned settlement—(1) that Roger Hall, of Narrow-water, Warrenpoint, in the county of Down, and Sir Hunt Henry Allan Johnson Walsh, of Ballykilcavan, Stradbally, in the Queen's County, might be appointed trustees of the above-mentioned settlement for the purposes of the Settled Land Acts; (2) or in the alternative that it should be declared that Augustus Edward Brush and George Brush had power to appoint new trustees of the said settlement.

The facts were stated in the affidavit of the solicitor for the applicant, and were as follows:—

By the will of General the Hon. Robert Meade, dated May

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13th, 1851, the above-mentioned lands stood limited to uses under which Captain John Percy Meade was beneficially entitled in possession as tenant for life, having succeeded his father on July 5th, 1886, with remainder to his eldest son John Wyndham Meade, an infant resident with him.

The trustees of the will, of whom Augustus Edward Brush of Drumnabreeze, Lurgan, in the county of Antrim, was the sole survivor, were not trustees thereof for the purpose of the Settled Land Acts. John Percy Meade sold a considerable portion of the said estates to the occupying tenants under the Land Purchase Acts, and by order of the Irish Land Commission, dated February 2nd, 1892, the said Augustus Edward Brush and George Brush were appointed trustees of the said will for the purpose of the Settled Land Acts.

By an indenture dated December 30th, 1893, and made between the said John Percy Meade of the first part, Helen Frances Meade, therein called by her then name of Helen Frances Walsh, of the second part, and Roger Hall and Sir Hunt Henry Allan Walsh, Bart., of the third part, the said John Percy Meade, in exercise of the power conferred upon him by the said will granted the said lands in the county of Down unto the said Roger Hall and Sir Hunt Henry Allan Walsh, upon certain trusts for securing pin-money and jointure for the said Helen Frances Meade, and subject thereto to hold the same for the term of 600 years, upon certain trusts for raising portions for younger children of the intended marriage (afterwards solemnised) between the said John Percy Meade and Helen Frances Meade not exceeding in any event £4000.

The said John Percy Meade as such tenant for life required to raise money by way of mortgage to pay off paramount incumbrances affecting the said settled estates, and arrangements were entered into for borrowing the said money from a lender in England. The said Augustus Edward Brush and George Brush at the same time desired to retire from the position of trustees for the purpose of the Settled Land Acts, to which they had been appointed as afore-said, but were willing to join in a deed (which was accordingly prepared, but not executed, for the reasons afterwards mentioned) appointing trustees for the purpose of the Settled Land Acts in

their places, and at the same time to appoint the same persons to be trustees of the will of the said General Meade, in the place of the said Augustus Edward Brush, and his co-trustee, who had died. The proposed lenders refused to advance any moneys on these facts, on the ground that the said Augustus Edward Brush and George Brush had only been appointed trustees of the will of the said General Meade, and that since their appointment the settlement within the meaning of the Settled Land Acts was not merely the said will, but the said will and the said indenture of December 30, 1893, of which compound settlement there were no trustees.

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R. F. Harrison, in support of the summons, referred to *Knowles' Settled Estates* (1); *Vine v. Raleigh* (2); Settled Land Act, 1882, sections 2 and 38; Settled Land Act, 1890, sect. 11; 48 & 49 Vict. c. 73, sect. 13; 50 & 51 Vict. c. 33, sect. 23; 54 & 55 Vict. c. 48, sect. 19 (3).

THE MASTER OF THE ROLLS (having read the summons and affidavit, proceeded as follows):—

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Jan. 12.

I am of opinion, under these circumstances, that the will of General Meade, dated May 13th, 1851, and the deed of December 30th, 1893, together constitute the settlement. The term of 600 years, created by the latter instrument, is a subsisting estate in the lands, deriving its validity, no doubt, from the will, and for many purposes to be read as if it had been written into the will, but none the less a part of the settlement under which the lands are now held. I think that if *Theellusson's Act* (in English settlements) is to be held a part of the settlement by reason of its controlling and modifying the trusts of the instrument *inter partes*, as in *Vine v. Raleigh* (2), it is *a fortiori* that where a term has been created, which under the will might or might not have come into existence at all, the instrument creating it in fact is part of the settlement. This is not a derivative settlement, as in *Knowles' Settled Estates* (1), where the fee in remainder after a life estate, having been regularly appointed so as to vest in the object of the power

(1) 27 Ch. D. 707.

(2) [1896] 1 Ch. 37.

M. R. was afterwards (next day) put in settlement upon an entirely new set of trusts. The latter constituted the "derivative settlement," and could not take effect until every trust in reference to the land contained in the original settlement was executed. The first settlement was complete and performed. The second was for conveyancing purposes an independent settlement, just as if the fee had been derived from some other source, though, of course, the original settlement was a vital part of the title. That case therefore does not apply. I shall appoint the persons mentioned in the summons trustees for the purposes of the Settled Land Acts, with the usual order as to costs.

Solicitors for the applicant : *J. Murland & Co.*

W. L.

V.-C. IN RE BELFAST WAREHOUSE CO. AND COMPANIES
1895. ACTS; EX PARTE CARMICHAEL.

Oct. 30, 31.

Nov. 20.

Appeal,

1896.

Feb. 21, 24.

May 1.

Bills of exchange—Securities for—Double insolvency—Company in liquidation—Claims of bill-holders—Doctrine of Ex parte Waring.

In order that the rule in *Ex parte Waring* (19 Ves. 346) should apply, both estates must be insolvent, and both must be under forced or judicial administration or liquidation.

SUMMONS by the liquidator to take the directions of the Court as to the application of assets of the Company which was being wound-up under order of the Court. Carmichael, who was a trader in Belfast, and a customer of the Company, had given a mortgage to the Company to secure advances made to him from time to time on foot of bills guaranteed by the Company. Carmichael, who had received advances to the extent of £21,000 odd, having compounded with his creditors out of Court, the holders of his bills claimed to have £3500, the proceeds of the mortgage which had been realized by the Company, appropriated to their debt. The bill-holders had been paid a dividend in the liquidation of 2s. in the £1, and Carmichael had paid 2s. 6d. in the £1.

Gordon, Q.C., and *J. H. Moore*, for the liquidator :—

V.-C.

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Ex parte Waring (1) only applies when both estates are insolvent, and under the control of the Court: *Ex parte General South American Co.*, *In re Yglesias & Co.* (2); *In re General Rolling Stock Co.*, *Ex parte Alliance Bank* (3). In *Royal Bank of Scotland v. Commercial Bank of Scotland* (4) both Companies were being wound-up in Court. In *Powles v. Hargreaves* (5) the parties submitted to the jurisdiction of the Court. Though Carmichael is unable to pay his debts, his property is not being administered by any Court. The Warehouse Company are in the position of sureties on the bills. Where bill-holders get more than is produced by the security, the secured creditor cannot prove for the balance: *In re Joint Stock Discount Company, Loder's Case* (6); *Sheffield Banking Company v. Clayton* (7); *Royal Bank of Scotland v. Commercial Bank of Scotland* (4).

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On the authority of *Loder's Case* (6) the dividends paid in both estates are to be added together. The moment the Warehouse Company have paid the full amount of the security realized by them there is an end of the liability.

In *Levi's Case* (8) the mortgage was in the same general form as here, and it was held that *Ex parte Waring* (1) did not apply. The security is not specifically appropriated to bills. It is a general mortgage to secure Carmichael's current account. The evidence negatives specific appropriation.

[Counsel referred also to *Yate Lee on Bankruptcy*, p. 284.]

Meredith, Q.C., and *Jefferson*, for the bill-holders :—

The £3500 realised is to be applied for the benefit of the bill-holders generally. We base our claim on *Ex parte Waring* (1); and on the express appropriation by the Warehouse Company of this security to the payment of bills. The Company hold these assets on a kind of trust, which prevents them being applied for the benefit of the general creditors. The principle of *Ex parte*

(1) 19 Ves. 345.

(2) L. R. 10 Ch. App. 635.

(3) L. R. 4 Ch. App. 423.

(4) 7 App. Cas. 366.

(5) 3 De G. M. & G. 430.

(6) L. R. 6 Eq. 491, at p. 495.

(7) [1892] 1 Ch. 621.

(8) L. R. 7 Eq. 449.

V.-C. *Waring* (1) is clear and settled law in England and Ireland, though not in Scotland: *Royal Bank of Scotland v. Commercial Bank of Scotland* (2).

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The extension of the doctrine in *Powles v. Hargreaves* (3) deprives the Warehouse Company of portion of the indemnity they stipulated for: *Bank of Ireland v. Perry* (4). If the property has been specifically appropriated to payment of the bills, when realised it forms no portion of either estate: *Powles v. Hargreaves* (3) decides that the principle of *Ex parte Waring* (1) is not to be restricted to cases of judicial insolvency. The principle was not so restricted in that instance. That case was approved in *In re Barned's Banking Company* (5); *Loder's Case* (6) has not been followed, and cannot be supported. The bill-holders are entitled to prove for the full amount of their debt, but we admit that the proof must be reduced by the amount produced by the securities, and that the bill-holders must pay back 2s. in the £1, or whatever they may realize out of the security, on the difference between the original proof, and the proof as so reduced. In *Loder's Case* (6) Lord Romilly decided that one of the estates was solvent, and that, therefore, *Ex parte Waring* (1) did not apply.

The securities were held by the Warehouse Company against the bills, and against nothing else; and there has been a specific appropriation of the property to payment of the bills, on the faith of which the bills were discounted. The property was impressed with a trust binding on the liquidator who is in no higher position than the Company. The specific appropriation must be given effect to: *Ex parte Dever* (7).

[Counsel also referred to *In re General Rolling Stock Company*, *Ex parte Alliance Bank* (8), and Robson on Bankruptcy, p. 507.]

Nov. 20.

THE VICE-CHANCELLOR:—

This is an application by the Liquidator for directions as to the application of a sum of £3500 realized by the sale of certain premises mortgaged to the Company by John Carmichael by deed

(1) 19 Ves. 345.

(2) 7 App. Cas. 366.

(3) 3 De G. M. & G. 430.

(4) L. R. 7 Ex. 14.

(5) L. R. 19 Eq. 1.

(6) L. R. 6 Eq. 491.

(7) 13 Q. B. D. 766.

(8) L. R. 4 Ch. App. 423.

of the 5th June, 1888. The circumstances on which the question raised for adjudication depends are briefly as follow:—Carmichael who was a trader in Belfast and a customer of the Company, had occasion to borrow from time to time large sums of money for the purposes of his business, and being unable to do so on his own credit he applied to the Company to guarantee the repayment of the advances he required, which they agreed to do, but they required an indemnity from him against any liabilities they might incur by reason of their guarantees, and accordingly he executed to the Company the mortgage on foot of which the £3500 has been realized. This security was very general in its terms and was not confined to any particular liabilities, and it was also wide enough to cover all indebtedness of Carmichael to the Company whether on foot of guarantees to third parties or general cash advances. As its terms are very important I shall read them from the deed:—Carmichael thereby covenants with the Warehouse Company that he would on demand pay to the Company, their successors, or assigns, “all sums of money which now are owing or shall from time to time hereafter become owing to the Company from the said John Carmichael whether alone or in co-partnership with any other person or persons in account current with the Company, for or in respect of the amounts of all bills of exchange which heretofore have been, or hereafter shall be, drawn by the said John Carmichael, either solely or jointly with others upon the Company, and which have been or shall be accepted and paid by the Company, and for all bills drawn or endorsed or which shall hereafter be drawn or endorsed or otherwise secured by the Company for the said John Carmichael, either solely or jointly with others, and for all cash advances, loans, discounts, credits, advances, and payments of any and every description by the Company to or for the accommodation, or at the request, of the said John Carmichael, either solely or jointly with others.”

The Company had large dealings with Carmichael on foot of this arrangement, and accepted and endorsed bills of exchange drawn or accepted by Carmichael for sums borrowed by him from time to time from banks and private lenders, and at the time of the winding up of the Company he was a debtor on foot of loans guaranteed by the Company to the amount of over £19,000, besides

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other debts. The holders of the securities so guaranteed brought in claims in the liquidation of the Company as creditors of the Company for the amount of their demands, which were allowed, and on foot of which they have already been paid out of the assets of the Company a dividend of 2s. in the £1, amounting to £1943, and are about to be paid a further dividend of the like amount. After the commencement of the present winding-up Carmichael made a composition with his creditors, but not through the Court of Bankruptcy, nor has he become a bankrupt, nor are his assets under the administration of any Court.

His creditors whose debts were guaranteed by the Company now contend that they are entitled to receive the £3500 realized by the liquidator on foot of the mortgage in part discharge of their demands, and to be allowed to claim a dividend on foot of the balances due to them, giving credit of course for the dividends they have received on foot of the £3500.

They seek to bring this claim within the rule said to be established by the case of *Ex parte Waring* (1). It has not been, nor could it be successfully contended that there is either a contract or a trust on which they can rely. There was certainly no privity of contract between the holders of Carmichael's bills and the Warehouse Company which would entitle the former to sue the latter either at law or in equity on foot of the counter security given by Carmichael to the Company. Nor was there any fiduciary relation between them which would entitle the holders of the bills to sue the Company in equity to declare a trust for them affecting the subject of the indemnity mortgage. There was no relation of principal and surety between the holders of the bills and the Company. The case of *Ex parte Waring* (1), did not proceed on any of these grounds. It appears to have proceeded on the ground of its being a convenient way of administering the estates of two persons, both of which were then under judicial control, and where a dividend that was payable to a guarantor in one estate was paid directly to the creditor who was entitled to payment in the other estate. This was extended to cases where one estate was being administered in Bankruptcy and the other in Insolvency, and also to cases where one of the estates was

being administered in the Court of Chancery, and the other was in Bankruptcy, and to cases where the parties submitted to this being done, and to cases where by express agreement one of the estates was to be administered in an administration out of Court as if the same was being administered in Bankruptcy. But in no case was it allowed to prevail when both estates were not under administration or *quasi* administration. In the case of *The Rolling Stock Co., Ex parte the Alliance Bank* (1), Selwyn, L. J., states the doctrine thus: "In such cases the claims of the bill-holders depend, not upon any contract to which they are parties; for in *Ex parte Waring* (2), as in this case, the bill-holders had not even any notice of the existence of the securities, the benefit of which they claimed; the right in these cases depends on the accidental concurrence of circumstances giving rise to such complication as can only be solved by one particular application of the securities or the proceeds of the securities. In order to give rise to such a state of things there must be two insolvent estates, and there must be to the extent pointed out in *Powles v. Hargreaves* (3), a forced administration of both these estates." In that case there was an admission by the personal representative of the party whose estate was not under forced administration, of the insolvency of it, and a submission to be bound accordingly.

This question was expressly decided in the case of *The General South American Co., In re Yglesias* (4), by the Court of Appeal in England, where the application of the rule in *Waring's Case* (2) was considered, and in which *Powles v. Hargreaves* (3) was cited in argument. There one of the parties to the transaction, Yglesias & Co., were in liquidation, and the other, Madinya & Co., had compounded with their creditors, but their estate was not under administration in any Court. James, L. J., says:—"The rule in *Ex parte Waring* (2), which was originally applied as between two bankrupt estates, has been extended to two insolvent estates which are being administered—one in bankruptcy, and one in Chancery, or one in bankruptcy and one in insolvency; but no Judge has ever expressed an opinion in favour of extending the rule to a case where, as in the present, one of the

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(1) L. R. 4 Ch. App. 423, at p. 428.

(3) 3 De G. M. & G. 430.

(2) 19 Ves. 315.

(4) L. R. 10 Ch. App. 635, at p. 638.

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parties, though practically insolvent, is subject to no jurisdiction, and cannot be compelled to submit his rights to any Court. Here *Madinya* can say, 'I gave a direction to *Yglesias* as to the application of the remittance, but I am master of that direction. I recall it. I am under no obligation to any human being not to tell *Yglesias* to apply that remittance in any way I please.'

In my opinion the rule cannot be extended to a case where there is a party whose estate is not under administration." And Mellish, L. J., says:—"I am of the same opinion. The Court must take care not to do any act which would deprive a party, not under its jurisdiction, of any rights of property which he possesses. In a case where two insolvent estates are being administered by the Court, no Court of justice allows the rights of the parties to be altered from what they were at the time when it undertook the administration. But where, though a party is insolvent, his property is not under the control of any Court, he has the ordinary rights of property, and the Court cannot interfere with any directions he may give about his property. If we, against the will of *Madinya & Co.*, were to say that these remittances shall be applied in a way which they do not direct—namely, in payment of the bills accepted for them by *Yglesias & Co.*, they never having pledged them to the bill-holders, we should be depriving *Madinya & Co.* of their ordinary rights of property, a thing which, in my opinion, we have no jurisdiction to do."

In the case of *The Royal Bank of Scotland v. The Commercial Bank of Scotland* (1), the doctrine of *Waring's Case* (2) came under the consideration of the House of Lords, and though the question as to the necessity of both estates being under forced administration did not arise—for there both estates were in liquidation—the language of the Lords, who gave judgment, appears to show that this was an essential circumstance.

In the present case there has not arisen a state of facts sufficient to bring it within the course of proceeding adopted in *Waring's Case* (2), and the other cases of that class. For, assuming that the winding-up of the Belfast Warehouse Co. is

(1) 7 App. Cas. 366.

(2) 19 Ves. 345.

a forced administration of their estate, there is certainly no forced administration of the estate of Carmichael. He is not bankrupt, and his composition with his creditors is not under the control of any tribunal, and cannot be deemed a forced administration of his estate. He is not a party to the present proceedings, nor is he, by submission or otherwise, bound by them. His rights under his contract with the Company cannot be interfered with by directing, in his absence, that the sum in the liquidator's hands should be applied as these bill-holders now seek to apply it. The mortgage on which it was realised was a transaction between him and the Company only, and no third party has any equitable right to interfere with the disposition of it.

But there is another ground on which the bill-holders' claim may be effectually met—namely, the nature of the indemnity given by Carmichael to the Company. This is particularly set out in the mortgage or indemnity deed which I have read. The indemnity is general against all sums of money then owing, or which should from time to time be owing, to the Company from Carmichael in account current with the Company for or in respect of all bills theretofore or thereafter drawn by him upon the Company, and accepted and paid, or drawn or endorsed or otherwise secured by the Company for him, and for all cash advances, loans, discounts, credits, advances, and payments of every description by the Company to, or for the accommodation or at the request of, Carmichael. The deed was, in fact, an ordinary banker's mortgage. I fail to see that the bill-holders, now seeking to establish a lien on the mortgaged premises, have any equity entitling them to have a sum realized on foot of this security applied specifically to their demands. Every creditor of the Company, no matter when and how his demand became payable by Carmichael, and for which the Company became liable on their guarantees, would have the same equity in respect thereof as the bill-holders now claim. There might have been an actual appropriation by contract between these several parties of the indemnity security to any particular debts due, or to become due, by Carmichael, and guaranteed by the Company, and the bill-holders here allege that there was such a contract. The evidence they rely upon in support of this is contained in

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V.-C. affidavits of the Belfast manager of the Bank of Ireland, Mr.
 1895. Whelan; of Mr. Ferrar, one of the firm of Jaffè Brothers; and

In re of Mr. M'Kee, one of the Directors of the Belfast Banking Co.,
 BELFAST all of whom had discounted bills for Carmichael on the guarantee
 WAREHOUSE Co.; of the Warehouse Co.; but I do not think that they have made
Ex parte out any such appropriation. Mr. Whelan states conversations
 CARMICHAEL between him and J. G. Boyd, the Managing Director of the Com-
 pany, when, in reply to a question as to what value was represented
 by Carmichael's acceptances, he said that they were drawn against
 valuable properties belonging to Carmichael as collateral security;
 but so far from this being an appropriation, he states that when
 he asked Boyd to give his bank some of these securities, he
 refused to do so, because there were other bills current in other
 hands drawn against the same securities. These conversations
 were plainly with a view to be satisfied as to Carmichael's sol-
 vency, and an appropriation was in terms refused.

Mr. Ferrar's conversations with Boyd only show a representa-
 tion by Boyd that the Company held title-deeds of Carmichael's
 property which he would continue to hold so long as any money
 was due to Jaffè Brothers by Carmichael and the Company, and
 he states that when asked by him to deposit the deeds with Jaffè
 Brothers he refused to do so except on a condition which Mr.
 Ferrar refused to comply with. Mr. M'Kee states that an arrange-
 ment in writing was made in the year 1891 with Boyd, the only
 material portion of which was that Boyd assured the Belfast
 Banking Company that the Warehouse Company held, and would
 continue to hold, collateral security of satisfactory nature and
 amount, on the faith of which his bank discounted Carmichael's
 bills. This, again, appears to me to be only a representation of
 Carmichael's solvency, and not an appropriation of the mortgage
 security to payment of the bank's advances. I cannot treat his
 statements of opinion as to what the bank would or would not
 have done as constituting a contract for a specific appropriation,
 especially when there existed an agreement in writing on the
 subject.

On these grounds I must hold that these bill-holders have not
 established either in law or in fact the right to apply the sum in
 question to payment of these bills. The assets of the Company

have already paid over £1900 to these bill-holders on foot of the guaranty for Carmichael's bills, and will immediately pay a like amount. These payments will exceed the amount of the proceeds of the mortgaged premises, and as the £3500 was properly applicable in the first place to repay to the assets of the Company the sums paid on foot of Carmichael's bills guaranteed by them, that sum must now be dealt with as assets of the Company for the discharge of its liabilities, and I direct the liquidator to so apply it.

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The bill-holders appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Barry, and Walker, L. JJ.)

Appeal.
1896.
Feb. 21, 24.
May 1.

Serjeant Dodd, and *Meredith*, Q.C. (with them *Jefferson*), for the appellants.

Gordon, Q.C., and *J. H. Moore*, for the respondent.

The arguments were the same as in the Court below.

The judgment of the Court was delivered by—

WALKER, L. J. :—

The appellants in this case who are the indorsees and holders of bills drawn by John Carmichael, and accepted by the Warehouse Company now in liquidation, contend that they have an equitable right, under the rule in *Waring's Case* (1), to have the sum of £3500, representing a security given by John Carmichael to the Warehouse Company, applied in payment, so far as same will extend, of the bills held by them, and that they are entitled to prove for the balance against the estate of the Warehouse Company, and the estate of J. Carmichael, and to receive dividends out of both estates.

May 1.

This claim is resisted by the liquidator of the Warehouse Company upon two grounds, the first of which is that the form of

(1) 19 Ves. 345.

Appeal. the security given to the Warehouse Company is such that the
 1896. equity contended for does not arise in respect of the particular
In re bills in question.
 BELFAST
 WAREHOUSE Co.; The mortgage bears date the 5th June, 1888, and was given
Ex parte to secure all present and future bills—present and future cash
 CARMICHAEL. advances, and credits of every kind, and all liability of every de-
 Walker, L.J. scription upon current or other accounts—in fact, it was in the
 nature of a banker's mortgage in its more general and extended
 form. It is fully set out in the judgment of the Vice-Chancellor,
 and I refer to his statement of it. All the bills in respect of
 which the question arises matured in April, 1894, and were of
 course given long after the mortgage.

The security was, by consent of all parties, valued at £3500, and this sum was lodged in bank on deposit in the joint names of the liquidator and John M'Cullagh, as representing the creditors of Carmichael, to remain there until it was decided by the Court whether the holders of the bills were entitled to have it distributed rateably amongst them. From a calculation made by the liquidator it appeared that the dividend paid and to be paid by the Warehouse Co. would exceed the £3500.

It is admitted that the only liability of Carmichael to the Warehouse Co. at the date of liquidation was on those bills, and there was, therefore, no other subject on which the security could operate. The argument, however, was that the security was given for what should be owing on a general account, and not to secure the particular bills, and that the Warehouse Co. were entitled, under the contract, to be indemnified against all payments they might be called upon to make, including dividends, and *Levi's Case* (1) was referred to. No doubt if the cash credit, to secure which the security was given, is different from the credit of which the bills in question form part, I can understand the argument, and also *Levi's Case* (1), if the facts in that case were what I have suggested; but when a security is given sufficient in terms to cover not only the bills in question, but other liabilities, and in the events that have happened there is no other liability to be covered but the bills, I think the security should be treated as one against the bills, and this seems to me to be the decision of Lord

Hatherley in *The City Bank v. Luckie* (1). There is no doubt an injustice done to the secured estate by the application of it, when the security is deficient, but that happens though the security covers the actual liability that exists, and is a necessary incident to the rule pointed out by Lord Blackburn in *The Royal Bank of Scotland v. The Commercial Bank of Scotland* (2)—a matter I shall again refer to on the second branch of this case. If it were necessary to decide this point, I would be prepared to adopt the view of the case put forward in *Yate Lee on Bankruptcy*, p. 286, and which I only refer to as expressing my own inference independently of it, viz. that “the rule applies not only when the security is appropriated to meet particular bills, but also when it is given to secure the balance which may from time to time be due of a cash account, if the bills in question form part of that account.” But it is not necessary, in the view I have taken, to decide the point, and I express no final opinion upon it, especially as the Vice-Chancellor seems to have formed one different from mine.

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The other ground of resistance to the appellant's motion involves a question of more nicety, and necessitates the examination of the principle of the rule in *Ex parte Waring* (3), and the determination of the limits within which it should be applied.

The rule in *Ex parte Waring* (3), is not a rule of law, but a rule of administration, which sprung out of the necessities connected with the administration of two insolvent estates in which there would otherwise have been a dead lock. The foundation of the equity is stated in the judgments of several eminent Judges, but nowhere, I think, more clearly than by Lord Hatherley in *The City Bank v. Luckie* (1), and Cotton, L.J., in *Ex parte Dever* (4). Lord Hatherley says: “The case of *Ex parte Waring* (3), stands upon a very plain and simple principle, which, when once understood, strikes everyone as being the simple equity of the relations between parties to contracts of this description. If a person gives a security for the payment of any debt constituted, amongst other things, by bills upon which his creditor has made himself liable in order to advance money to the debtor, then, in the case of both parties becoming insolvent, the question arises which

(1) L. R. 5 Ch. App. 773.

(3) 19 Ves. 345.

(2) 7 App. Cas. 366.

(4) 14 Q. B. D. 611.

Appeal. Lord Eldon solved in *Ex parte Waring* (1), namely, whether the
 1896. estate of a person who by becoming insolvent was not able to pay
In re the bills, could claim the benefit of the security, the bills remain-
 BELFAST ing unpaid. The holders of the bills of course would say that
 WAREHOUSE the holders of the bills of course would say that
 Co.; they were in the position of the holder of the security, though not
Ex parte by virtue of any contract with him, because there was no contract
 CARMICHAEL. in respect of the bills, for as long as both parties were solvent he
 Walker, L.J. who gave the security and he who received the security might
 deal with the security just as they pleased, without any regard to
 who might be the bill-holders. But when there came to be a
 question whether the bills were to be paid or not, it was impossible
 for the estate which claimed the value of the security subject to
 the charge, to get back the security, unless all the duties that
 attached to it had been fulfilled. On the other hand, the
 other estate was not in a condition to make payment of
 the bills, and thus to come upon the security for indemnity.
 Therefore matters stood at a dead lock, and nothing could be done
 on one side or the other. Lord Eldon, in *Ex parte Waring* (1), solved
 the difficulty by saying it was true that these were bills which
 were not paid, but, inasmuch as the estate of the debtor could not
 be withdrawn until the bills were paid, and inasmuch as the
 estate of the creditor holding the security was in such a condition
 that he was not able to make payment of the bills in moneys
 worth, the only way was to dispose of the security and pay the
 bills." I shall not occupy time by reading the language of Lord
 Justice Cotton in *Ex parte Dever* (2).

Since *Powles v. Hargreaves* (3), it is too late to say that the
 same equity will not be applied in favour of the bill-holders where
 the security is a deficient one for payment of the bills, but there
 follows in such a case from the application of this rule of administra-
 tion the injustice that when the whole benefit of a deficient security
 is given to the bill-holders, the estate of the bankrupt acceptor may
 lose some part of the indemnity, to which by the contract he is
 entitled. The bill-holder in such a case is let in to prove for the
 balance on the estate to which the security belonged, and also on
 the estate of the drawer, and the estate to which the security

(1) 19 Ves. 445. (2) 14 Q. B. D. 611. (3) 3 De G. M. & G. 430.

belonged loses, to the extent of the dividend paid on the proof, the benefit of the indemnity fund and of the contract of indemnity. This is clearly pointed out by Lord Selborne and Lord Blackburn in *Royal Bank of Scotland v. Commercial Bank of Scotland* (1), where they show that when the security is deficient the amount of the dividend payable to the creditors of the estate to which the security belonged is always diminished. For these reasons it was decided in the House of Lords that the rule of administration should not be extended to the administration of the Scottish Bankrupt Law. The present case is one in which the security is deficient, and there is no just reason for extending the principle of the decided cases so as to affect or injure, beyond what we find actually established, the contract of indemnity which the Warehouse Company obtained.

It is also settled that the rule is applicable not only when there are two bankruptcies, but also when one or both of the estates are insolvent as distinct from bankrupt, and I assume it also to be settled, notwithstanding the *dictum* of Wigram, V.-C., in *Laycock v. Johnson* (2), that the insolvencies need not be judicial insolvencies.

But it is also, I think, established that in order to bring into existence this rule of administration there must be in existence a forced administration of both the estates—the two estates must have to be administered by some *vis major*, whether under the jurisdiction of the Court of Chancery or Court of Bankruptcy, or other competent tribunal, or under some binding deed which attracts the law of bankruptcy, or requires the property to be administered or distributed according to its rules, as was the estate of one of the parties in *Powles v. Hargreaves* (3), and also in *Ex parte Ackroyd* (4). The tribunal administering both estates need not be in the United Kingdom. In *Ex parte Smart* (5), the estate of one party was being wound up under the law of Havannah; and in *Ex parte Deter* (6), the estate of one party was being administered in Ceylon. But in this last case the Court would

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(1) 7 App. Cas. 366.

(2) 6 Hare, 199.

(3) 3 De G. M. & G. 430.

(4) 3 De G. F. & J. 726.

(5) L. R. 8 Ch. App. 220.

(6) 14 Q. B. D. 611.

Appeal. 1896. apparently have not applied *Ex parte Waring* (1), if it had not been proved that the estate of the party as to whom the difficulty arose was not only insolvent, but was being judicially administered in Ceylon by reason of the condition of its affairs. In *In re BELFAST WAREHOUSE Co.; Ex parte CARMICHAEL.* the case of *In re Yglesias* (2), Yglesias had filed a petition for liquidation, and Madinya, one of the parties, was insolvent, and Walker, L.J. had executed a deed of composition to which a number of his creditors were parties, providing for the liquidation of his scheduled debts, but he was subject to no jurisdiction, and his property was not under the control of the Court. It is true that the holders of the bills had not assented to Madinya's deed, or proved under it, but the point of the decision seems to be that the property was not under the control of the Court, and the Court could not interfere with him or his property.

The case of *Perry v. Bank of Ireland* (3) was an interpleader issue, in which the Law Court, therefore, was enabled to deal with the case on equitable grounds. The fund *in medio* was in the hands of Coventry & Co., who submitted to deal with it as the Court should direct. James Pain & Co. had executed an inspectorship deed, and Perry had executed a deed of composition, and all the persons representing both these estates were brought before the Court, and, as the fund was not claimed by them, the Court was enabled to say that it belonged to the bank, whether on an equity arising from the dealings proved, or, as Cleasby, B., put it, on the principle of *Ex parte Waring* (1). The case *Ex parte Belfast Bank* (4), before Judge Miller, is a direct authority on this part of the case adverse to the appellants; but we could of course review the decision if we considered it necessary. Upon the whole, I think the law is correctly stated in the text-books on this point, *e.g.* in Robson on Bankruptcy, page 50, where it is put thus:—"There must also be the concurrent administration of both insolvent estates by competent tribunals," and in Williams on Bankruptcy, p. 165, I find it stated—"There need not be two judicial insolvencies; but they must both be under judicial administration." I do not refer to these text-books as authorities, but

(1) 19 Ves. 345.

(3) L. R. 7 Ex. 14.

(2) L. R. 10 Ch. App. 635.

(4) Ir. R. 11 Eq. 193.

as illustrations of my own conclusion. This view seems to me to harmonise more with the idea of the interference of some supervening authority, and the *vis major* relieving the block which had arisen in administration of the two estates.

This makes it necessary to consider what exactly is the position of Carmichael and his estate. The Warehouse Company went into liquidation in May, 1894, and Carmichael in consequence called a meeting of his creditors. His statement of affairs is dated the 8th May, 1894, and his proposal to his creditors is dated the 26th October, 1894. The realized security was represented by a sum of £3500, and he undoubtedly desired this should go to the bill-holders, and proposed to pay his unsecured creditors, including the bill-holders (after deducting their rateable proportion of the £3500) 2s. 6d. in the £. He next executed a composition deed dated the 13th June, 1895, made between himself of the one part and the creditors who should assent to it on the other, and he proposed to pay a composition, as in his proposal, by three instalments, at four eight, and twelve months, from the 1st January, 1895, secured by his promissory notes, of which the first instalment was then paid, and he covenanted to make these payments, and the creditors in consideration thereof released him; and the deed contains a proviso that if default should be made in meeting the notes at maturity, or if before they should be paid a receiving order should be made against the debtor, or he should present a bankruptcy petition, or make an assignment of his estate for the benefit of his creditors, or any arrangement with them different from the arrangement in the deed, the release and covenants should be void, and the creditors remitted to their rights. The bill-holders are assenting creditors, and received a composition on the balance, the £3500 being treated as *in medio*, to be disposed of according as the Court should direct. The deed contains no cession of Carmichael's property. The bill-holders received a boon from Carmichael's proposal, and of course are willing to adopt it, but as the Warehouse Company would be injured by it, the security being deficient, they naturally oppose the application of *Ex parte Waring* (1). I cannot see that under the circumstances there is any

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Appeal. forced administration, much less judicial administration, of
 1896. Carmichael's estate. It would be to apply the rule in *Ex*
In re *parte Waring* (1), with its consequent injustice, to the Warehouse
 BELFAST Company at the option of the other estate, and, as in my opinion
 WAREHOUSE Co.; it would be an extension of the rule to apply it to the case of the
Ex parte appellants, I think such extension should not be made, and
 CARMICHAEL. consequently that the decision of the Vice-Chancellor was in
 Walker, L.J. result correct, and that the appeal should be dismissed with
 costs.

Solicitors for the appellants: *L'Estrange & Brett.*

Solicitor for the respondent: *Buckley.*

G. Y. D.

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TIGHE v. SINNOTT AND OTHERS.

(1895. No. 358.)

Feb. 19-21,

25-27.

March 14.

*Several fishery—Tidal river—Grant from the Crown—Surrender by subject—
 Evidence—User—Charitable trust—Presumption in favour of lawful
 origin.*

From the finding of an inquisition in 1540 there was clear evidence of the existence, at and prior to that date, of a several fishery in tidal waters, which had been surrendered to the Crown. By subsequent instruments of title this several fishery was identified with that claimed by the plaintiff, who proved documentary title thereto. The evidence satisfied the Court that a several fishery was in fact held and enjoyed in accordance with the documentary title:—

Held, that the plaintiff had established his right to the several fishery claimed.

Prior to a grant in fee to T., a tenant in tail (one of the predecessors in title of the plaintiff), an inquisition was held in 1607. The jurors found (among other things) that T. was entitled to a several fishery (describing it by metes and bounds), and found that the commons of I. were in the habit of fishing there:—

Held, that the two findings must be taken together, and that, as there was no allusion to any title existing in the commons of I. to fish in the several fishery found to exist, that the latter finding must be looked on as a statement of fact, to be taken in connexion with other circumstances in the case:—

(1) 19 Ves. 345.

Held, also, that the several fishery found to exist in 1607 was not at that time subject to any rights, either of the public or of any specified or defined portion of the public; and that therefore the principle of *Goodman v. The Mayor of Saltash* (7 App. Cas. 633) was inapplicable.

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TRIAL OF ACTION.

The plaintiff Edward Tighe* claimed to be declared to be entitled to a several fishery in the river Nore in the county Kilkenny, from a place on the north commonly called or known as Dobbyn's Land, above the bridge of Inistioge, and extending along and down the said river, and past the island called Gowlaun Island, and the site of an old weir called the Red House Weir to a place on the south formerly called or known as the Bishop of Ossory's lands. The plaintiff also claimed that a perpetual injunction might be granted against the defendants to restrain them from fishing within the limits of the said several fishery.

The plaintiff's title as claimed in this several fishery commenced with a surrender to the Crown of the priory and monastery of St. Columbe, at Inistioge, which took place on the 20th March, 1540, in the reign of Henry the 8th. The way that the surrender appeared on the Patent Roll was this: There was on the 20th March, 1540, a surrender executed by Lawrence Whyte, Prior of the Priory, Monastery, or House of St. John the Baptist, near Newtown, at Trim, in the county of Meath, and that surrender is set out at length on the Roll. After that there is then a short statement "that Milo, Bishop of Ossory and Commissary of the Priory and the Chapter of the same place, in Council assembled, have made a like grant of the priory, monastery, or house of St. Colombe, of Enestioke, in the county Kilkenny." That surrender by the prior was of the monastery or house, with "All and every the manors, demesnes, messuages, gardens, with all the liberties, franchises, jurisdictions, privileges, courts leet (and so forth), preserves, waters, fish-ponds, and all and every the emoluments pertaining thereto, and all rights whatever," and these were surrendered to the Crown in the condition in which the monastery had held them.

After that surrender in 1540, and in the same year there

* The trustees of the settlement of the family estates were joined with Mr. Tighe as co-plaintiffs, but the latter is referred to as the plaintiff in the statement of title and the judgment.—[REP.]

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was an inquisition pursuant to the directions of the Crown for the purpose of ascertaining what were these surrendered lands and hereditaments, and it was held on the Tuesday next after Easter in the thirty-first year of Henry the 8th, in the year 1540. The inquisition found that the Crown was, by virtue of the surrender, entitled to the hereditaments and premises as therein described, and also to "one several fishery."

The Crown, in the year 1542, made a lease of the premises which had been so surrendered to Richard Butler of Ferns for twenty-one years. The lease was of "the priory, monastery, or house of St. Columbe," and included "all waters, loughs, fishings, and all other possessions and hereditaments as well spiritual as temporal, which lately were reputed to be parcels of the possessions of the said late priory, monastery or house of St. Columbe."

On the 20th of December, 1551, a lease in reversion was granted by King Edward the 6th to Edward Seyntloo for twenty-one years. That lease was not forthcoming, but there was a direction to issue a lease in the king's letter to Seyntloo. It states—"In consideration of the painful and diligent service done unto his Highness in his late wars in Ireland by his well beloved subject Edward Seyntloo, (he) is pleased, in consideration aforesaid, to grant unto the said Edward Seyntloo a lease in reversion of twenty-one years of the whole Monastery or Priory of Inistioge, in as large and ample manner as Sir Richard Butler, Viscount of Mountgarrett, doth now hold and enjoy the same," and he was to hold at the same yearly rent as was payable by Sir Richard Butler. By letters patent of the 24th of May, 1568, after reciting, amongst other things, the lease to Seyntloo, of the buildings and lands, and of "one several fishery there, on the water of the Nore, extending from the water called Dobbyn's Water to the water called the Bishop's Water, in which salmon are caught," the aforesaid buildings and premises, including "fisheries, fishings, waters," were conveyed and granted to Sir Edmund Butler of Cloughgrenan in tail male. Edmund Butler's eldest son, Theobald Butler, was, on the 4th of August, 1603, created Viscount Butler of Tulleophelim, and in 1607, in the reign of James 1, there was a grant in fee-simple by the

Crown, dated 20th December, to Viscount Tulleophelem, specifying a several fishery.

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Previous to the grant in fee there was an inquisition on 9th September, 1607, for the purpose of ascertaining what lands 'Tulleophelem, as tenant in tail, had. That inquisition found that Tulleophelem was entitled to the several fishery (describing it by metes and bounds), but also found "that the commons of Inistioge are in the habit of fishing there" (1).

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Tulleophelem died, without issue, in 1613, and his estates came ultimately to the first Duke of Ormonde in the way set out in paragraph 3 of the statement of claim:—Theobald Butler, the son and heir of the aforesaid Sir Edmund Butler of Cloughgrenan, was by patent of his Majesty King James 1, dated the 4th August, 1603, created Viscount Butler of Tulleophelem in the county of Carlow, and said Theobald, Viscount Butler of Tulleophelem was married to his cousin-german Lady Elizabeth Butler, the only daughter and heiress of Thomas, tenth Earl of Ormonde and Ossory, and died, without issue, in the year 1613, leaving his wife, the said Lady Elizabeth, him surviving, and she was afterwards married to Sir Richard Preston, who was by patent of King James 1, dated 6th June, 1614, created Lord Dingwall in Scotland and Earl of Desmond in Ireland, and by him had issue an only daughter, Lady Elizabeth Preston, who was married to James, eldest son of Thomas Butler, Viscount Thurles, son and heir of Sir Walter Butler of Kilcash, nephew of said Sir Edmund Butler of Cloughgrenan, and which Sir Walter Butler of Kilcash, on the death of said Thomas, tenth Earl of Ormonde and Ossory, became Walter, eleventh Earl of Ormonde and Ossory, and upon the death of the said Earl Walter, his said grandson James, son of said Butler, Viscount Thurles, became twelfth Earl of Ormonde and Ossory, and afterwards the first Duke of Ormonde.

His grandson, the second Duke of Ormonde, by virtue of an Act of Parliament (7 Wm. 3) passed for the purpose of

(1) "Dict' vicecom' Butler seis' est, in jure priorat' de Inestoeke de flumine de Noer cu sepal' piscar' ibm, viz. a ter' vocat Dobyn's land in boreal' pte, usque ad ter' epise' ossorien, ex pte meridional; (sed coes de Inestoeke solent piscar' ibm)."

M. R. dealing with the Ormonde estates, made a lease to one Richard
 1896. Fletcher, for lives, with a covenant for renewal, at a rent of £80.
TIGHE The lease, dated 24th March, 1696, demised the town and lands of
v. Inistioge, with (amongst other things) all waters, water-courses,
SINNOTT. fishings, and weirs. Fletcher assigned to Thomas Medlicott, on the
 5th October, 1697, in consideration of £400, and by endorsed deed
 of the 13th December, 1697, Medlicott acknowledged that the £400
 was the money of Stephen Sweet, for whom his name had been
 used in trust merely. By deeds of lease and re-lease, dated 9th and
 10th of July, 1703, James Duke of Ormonde, in pursuance of the
 Act enabling him to raise money by sale of underwoods and
 making leases for lives renewable for ever, for payment of debts,
 and for encouraging English plantation in Ireland, in considera-
 tion of £335 sterling paid to him by Stephen Sweet, granted the
 said land and premises mentioned in the said lease of the 24th
 March, 1696, to said Stephen Sweet, his heirs and assigns, for
 ever, at the same rent, receiver's salary, and accates, as in the
 said lease to Richard Fletcher, of the 24th March, 1696. From
 this Stephen Sweet the title was deduced to the plaintiff, who
 succeeded to the estates in January, 1891.

The other material documents and facts are referred to in the judgment.

The Right Hon. C. H. Hemphill, Q.C., Molloy, Q.C., and F. P. Hamilton, for the plaintiffs.

Piers F. White, Q.C., Sullivan, Q.C., and T. M. Healy, for the defendants.

March 14.

THE MASTER OF THE ROLLS (having referred to the deeds and documents previously set out) proceeded as follows :—

So far as documentary title goes it has not often been my lot to see a clearer case in favour of the existence of a several fishery, subject to the important questions arising as to the effect of the statement I have noticed in the Inquisition of 1607, that the commons of Inistioge were "in the habit of fishing therein." From the finding in the Inquisition of 1540 there is the clearest evidence of the existence at and prior to that date of a several fishery, the property of the Crown by virtue of the surrender by the Prior and Monastery of St. Columbe : and that fishery is by the subsequent

instruments of title identified in the most conclusive manner with the fishery claimed in the present action. The waters being tidal, as is admitted, the *onus probandi* of course lies upon the plaintiff; since *prima facie* the public have a right to fish wherever the tide ebbs and flows, and a claim to a several fishery is of course a claim to exclude the public. But if a several fishery existed in fact in the tidal estuary in question in and prior to 1540, a jury would be properly directed by a judge trying the case, that from that circumstance they would be at liberty to find that it had a legal origin; that is to say, that it had been created and put in defence prior to Magna Charta. An actual title by documents or records, extending back to 1215, cannot be shown in any case: at least I am not aware of any instance of such a thing. But the acceptance by the Crown, in 1540, of a surrender by a monastic community of what is proved by record to have been a several fishery at that date is unusually clear and cogent evidence that the monastery had held it by a title good against the Crown and anyone else which could only be the case by virtue of a grant from the Crown before Magna Charta. On this part of the case I have no doubt whatever that the existence of a several fishery, now vested in the plaintiff, ought to be treated as established, provided the evidence in the case shows that a several fishery was in fact held and enjoyed under and in accordance with the documentary title. Unless the evidence establishes this, however, no paper title, however clear, will be of any avail.

Upon this part of the case it will be convenient to consider the evidence for the plaintiff first.

First, the lease to Butler of 1542 includes all "the waters, loughs, fishings, weirs," &c., which had belonged to the monastery of St. Columbe. Following immediately after the Inquisition (which found a "several fishery") there can be no doubt what this meant.

Secondly, the lease to Seyntloo (recited in the grant to Edmund Butler) specified the several fishery by metes and bounds.

Both these terminable leases reserving rent were acts of ownership by the Crown. Payment of rent to the Crown by Theobald Butler (Tulleophalem) is proved by the Crown rentals 1607-1610. The Inquisition of 1607 finding that Viscount Butler "is seised of the

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stream of the Nore and the several fishery therein extending from Dobbyn's Land to Bishop of Ossory's Land," is powerful evidence of the title asserted by the plaintiff, passing by the effect of the statement that the commons of Inistioge were in the habit of fishing therein. Then there is another part of the case which is of great importance, viz. the fishing with weirs, mentioned in all these documents, and the existence of weirs in the place in question. It may be that the existence of a weir will not be proof of the ownership of the bed and soil. There has been a good deal of controversy in many cases about that, but the bed and soil are not in dispute in this case. There can be no question that the exercise of the right of fishing in that most notorious, and permanent, and public way, by using a weir, is the strongest evidence of claim, to say the least, to the right to a several fishery. The lease of 24th March, 1696, to Fletcher, comprises "fishings and weirs." The lease by Sweet to Joyce of 17th January, 1714, for twenty-one years at a rent of £7 of "a large old house slated at the south end of the old market place of Inistioge, now called the Manufactory House," describes the premises very accurately by metes and bounds. And there is a clause that the rent was to be paid at midsummer, Michaelmas, Christmas, and Lady Day in Lent, over and above and clear of all taxes and county charges—"and a couple of good large fat turkeys, yearly, at Christmas, and a good, fresh, large, tiddle fat salmon on the first Wednesday every Lent, and another on the first Wednesday in every May, or 10 shillings in lieu thereof, provided the said William Joyce uses the fishing, and the like rent and duty of salmon in manner as aforesaid for each and every person not a householder in Inistioge for the time being in his house, or otherwise a sojourner, servant, or co-partner with him who shall work in cots, or net, or fish for salmon; and also 5 shillings for each and every angrell or spent fish which they or any of them or any other person or servant, co-partner, or sojourner with them, or either of them, shall take, kill, or destroy, dispose of or eat the same, to be payable the very next day after such taking, killing, or destroying, disposing, or catching."

I shall have to consider the meaning of that reference to the inhabitants of Inistioge—"for each and every person *not* a

householder in Inistioge"—which has been relied on by the defendants. But as an act of ownership by Sweet, as far as it goes, there cannot be any question. Though that does not purport to deal with a several fishery, yet it must be taken at least as a license to fish or as an exercise of property over the fishery in the river Nore.

The next document is a lease, dated the 11th February, 1746, by Sir William Fowndes to Edward Archdekan. Fowndes was in under the Sweet title; and the predecessor of the plaintiff, and by this lease of 1746 he demised to Archdekan for thirty-one years, at the rent of £17 10s., "all that and those the sheep-field and the upper part of the plain from the upper ditch of the lane above the grove, with the house now in the possession of the said William Joyce, with the same enlargement that said Joyce hath to said house, together with the waste or ruins of holdings opposite the said Joyce's holdings to the river Nore, as also the waste ground called the holdings of John Givin with the bottoms called Inch to the point leading from said holdings, all situate, lying, and being in the town and lands of Inistioge in said county, together with all the rights, members and appurtenances thereunto belonging"; and the lease then contains the clause, "the said Sir William Fowndes, his heirs, and assigns shall have full and free liberty of fishing, hawking, hunting, and fowling on the said demised premises as often as he or they shall think proper; and likewise to have the benefit of all royalties, mines, and minerals, &c. . . . he, the said Edward Archdekan, during the said term to have full and free liberty to fish on the said river with nets" (the only river mentioned is the Nore), "he, the said Edward Archdekan, paying yearly unto the said Sir William Fowndes four salmons and eight peals for each net that he shall so fish with, or five shillings sterling in lieu for each salmon, and two shillings sterling for each peal which the said Edward Archdekan doth hereby promise to pay." On 17th January, 1755, Fowndes made a lease to Henry Hayden for thirty-one years at the rent of £17 10s. of premises, portion of the estate, which are described as "opposite said Joyce's holding to the river Nore, as also the waste grounds called the holdings of John Gwyn with the bottoms called Cosenigh to the point leading from said holdings, all situate, lying

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M. R. and being in the town and lands of Inistioge." It was also
 1896. agreed that the said Henry Hayden should pay four salmon and
 Tighe eight peals "for each net that he shall so fish with, five shillings
 v. sterling in lieu for each salmon, and two shillings sterling in lieu
 SINNOTT. for each peal." In 1772 Sir William Fowndes leased to Henry
 Hayden (I suppose the same person) the town and lands of Cloan,
 and there is a covenant in that lease; it does not admit a right
 to fish; but there is a covenant not to build any weirs in the
 river. In 1765 there was an agreement made between the same
 Fowndes and a man named Dyer by which he agreed to set the
 dwellings, house, and the appurtenances belonging thereto, and
 also three fields by the river Nore held by George Gwyn, de-
 ceased; and Dyer is not to alienate the same, and the important
 clause is:—"All royalties reserved unto the said Sir William
 Fowndes, the whole fish and fishing, &c.," which shows he was
 reserving to himself whatever fishery there was at that portion of
 the river.

Concurrently with some of these lettings there is clear proof
 from the cashbook and ledger entries in evidence that the rents
 reserved were actually paid, and further that the fishery was being
 carried on at the several weirs within the limits in question by
 and for the benefit of the estate. Thus practically the whole of
 eighteenth century is covered and a great part of the nineteenth.

In the year 1863 an inquiry was held into the legality of the
 weir in the Inistioge fishery under the Fishery Act, 26 & 27 Vict.
 c. 114. The Commissioners appear to have decided that the Right
 Hon. William Fowndes Tighe was entitled to the several fishery in
 the *locus in quo*, but that the weir (the Red House Weir) was in-
 jurious to navigation. On appeal to the Queen's Bench this
 adjudication on the 20th February, 1864, was affirmed on the
 latter ground, but the Court abstained from pronouncing any
 decision on the question of several fishery.

The weir which was so condemned was the most southerly of
 those within the ambit of the several fishery now claimed. The
 Fishery Commissioners in their report stated "That it was proved
 that the said fixed net was situated near the Wood of Great Oaks,"
 and "decided that the said appellant had established a good title to
 a several fishery in the place in question in 1862 and 1863, . . . but

the said Commissioners further decided that the said fixed net or weir was illegal." And on appeal it was ordered by the Queen's Bench "that the order of the said Commissioners be, and the same is, hereby affirmed, so far as the said order decides that the said fixed net or weir is injurious to navigation, and ought to be abated and removed." The weir was accordingly prostrated, and has ceased to exist since 1864.

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For what has taken place since as well as before that date, we have now to look to the oral evidence, from which it appears that as long as anyone now alive can recollect Colonel Tighe used to fish the Red House Weir, and that at the bridge of Inistioge (called the Ford Weir). This evidence goes far back to the early part of the present century, and the practice continued down to the year 1864. Colonel Tighe employed men and paid them, and used the fishery as a means of making money, uniformly, and in exactly the same way as he would naturally do if the several fishery was his. It is true that during a part at least of the time covered by this evidence cot-fishing was practised "up and down" the river Nore by persons not in his employment, and not expressly authorised by him to fish. It is however clearly proved to my mind that this cot-fishing, before the prostration of the weir, took place on a small scale, and was never so conducted as to injure or interfere with the fishing of the weir. Colonel Tighe is spoken of by all the witnesses as having been a good-natured and kindly man, generous in his dealings with the people about him, and one who would be very unlikely to hinder them from fishing, unless their doing so would have prejudiced his own rights. The part of the weir called Lenahogue or the Gash Pond is that in which the defendants are sought to be restrained from fishing. It is proved to my mind that persons without the leave of Colonel Tighe did on some rare occasions fish there (I am speaking of the time before 1864), but the evidence satisfied me that this occurred only on rare occasions, and then chiefly at night. I am also satisfied that Colonel Tighe when he knew of it tried to stop it, and on one occasion at least fined the persons concerned a sum of money which he stopped out of their wages, they being in his own employment. Below the Gash Pond, however, this practice of fishing by cots went on more

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extensively, extending far below the southern extremity of the several fishery claimed, below the bridge of New Ross and the confluence of the Nore and Barrow. That boats going down from Inistioge to these places may have sometimes shot their nets without interference in the place in question is extremely probable; but I am quite satisfied that till very lately, just before this action was commenced, such cases were rare, or at least very seldom occurred in daylight. If the weir had remained standing probably this state of things would not have been changed; for if Colonel Tighe had a right to use the Red House Weir, which caught fish going down on the tide, it is not to be supposed that the audacity of the cotmen would have extended so far as to lead them to try to take away all the fish from it.

But when the weir was removed, things were materially altered. Colonel Tighe then introduced a seine-net of large size, to be used in the mode with which we are all familiar; and it is proved by evidence of the clearest and most trustworthy character that about 1866 he summoned a meeting of the people who were in the habit of fishing, and told them that in the exercise of his rights he was going to start a seine-net in Lenahogue, because it was the most suitable place for it, and he asked them to keep out of it; but he said he would not interfere with their fishing below Teddington, a place below Lenahogue. He said that he had investigated his rights and believed he had the several fishery. They acquiesced, and for a long time there was no trouble. This can be accounted for only by the fact, which I believe, that Lenahogue was fished only by the large seine-net; for had cots been fishing with their nets at the same place, it is quite impossible that the plaintiff's net-fishing would have been of any use. The fact of this meeting in 1866 having been held after notice to the people interested is proved beyond shadow of doubt; and it must in a place like Inistioge have been notorious to everyone, certainly to all the fishermen. Yet not one of the defendants or of their witnesses would admit that he had ever heard of such a thing. They all swore to open, continuous, uninterrupted fishing in Lenahogue, as well as lower down, by day and by night. One of them was a man called Brophy. His father was examined for the plaintiff, and proved that he had been a caretaker, and had found people on

a few occasions fishing at Lenahogue : that this was only on the darkest nights : and when he came near there was a shout, "There's Brophy !" and they would make off. The son examined for the defendants, and himself of course a fisher at the very time in question, denied all this, and, in fact, charged his own father with perjury. Some of the defendants' witnesses were admittedly poachers, and had been fined for that offence. In short, their evidence was of the usual class in such cases—evidence, which to say the least, would need to be very largely discounted by anyone anxious to arrive at the truth.

And if the case had been merely as I have stated it up to this point, it would have been an easy one to decide. The plaintiff has proved a title so far as deeds and documents go ; and he has given a great mass of unimpeachable evidence to prove that enjoyment has followed the title. The onus lies on him. The defendants have not to prove any title in themselves in order to defeat the action, if they can show that the title of the plaintiff is defective. It would be waste of time to quote authorities on this part of the case, for *The Duke of Devonshire v. Neill* (1), following *Malcolmson v. O'Dea* (2), has settled the law on the subject. As a juror, and having carefully observed and weighed all the evidence in the case, I am of opinion that the plaintiff has discharged the onus cast upon him by the pleadings in the case as they stood when the trial was proceeding, and indeed till after the evidence had almost closed.

But the case of the defendants, as stated by Mr. White, was not solely or mainly that which had been pleaded. His chief reliance was on the case of *Goodman v. Mayor of Saltash* (3), and the argument is this:—"I deny the plaintiff's title *in toto*. On paper no title is shown. No enjoyment sufficient to support the paper title (if such there be) has been proved. The evidence of the defendants show a state of things inconsistent with the existence of a several fishery. But even if this be not so, there is in the case enough to satisfy the Court that even if the plaintiff has proved that he has a several fishery in the place in question, that right is subject to the co-ordinate right of the commons or

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inhabitants of Inistioge (of which class the defendants are members) who are entitled to fish either by virtue of some trust engrafted on the title of the plaintiff, or by reason of an exception legally established in favour of the class." Certain matters in connexion with the plaintiff's title seemed to me to render this latter view worthy of consideration, though I thought it not open on the pleadings, which were mainly traverses. I therefore allowed an amendment to raise it, which has been made, and runs as follows: "As a further defence the defendants aver that such several fishery was granted to the plaintiff's predecessor, subject to the proviso that the inhabitants, burgesses, or commons of the ancient liberty of Inistioge should have the right to fish the river Nore as they had been accustomed to do from time immemorial."

Mr. Hemphill, of course, objected to my doing this: and if I was wrong in allowing the amendment, he is to have the benefit of it; but I asked what terms, if any, he thought he was entitled to; and as he could suggest none except some matter as to costs which I decided against him, or the abandonment of the defences pleaded, which I thought unreasonable, the case proceeded on the amended pleading.

Now, *Goodman v. Mayor of Saltash* (1) is a very peculiar and remarkable case. It came before the House of Lords in 1882 on appeal from a decision of the Court of Appeal in England, affirming the judgment of the Common Pleas Division. In the Court of Appeal Baggallay, L.J., dissented, but with that exception all the judges were in favour of the defendants in the case. The question arose upon a case stated, and the facts were on the record, and the only question was what inference was to be drawn from the facts stated. The action was one for trespass in a certain part of the river Tamar, and on the soil, and for taking away a certain quantity of oysters for sale. The respondents were a corporation incorporated as a company by Royal Charter, and by virtue of such charter they claimed to be possessed of the soil of the several parts of the river Tamar in dispute. In the House of Lords it was held by all the Lords except Lord Blackburn that the right to the several fishery was proved by the plaintiffs. That

(1) 7 App. Cas. 633.

is the reason why in applying that case to the present, it is necessary for the defendants here to admit the existence of a several fishery. Paragraph 9 of the special case was as follows:—
 “That the free inhabitants of ancient tenements in the borough of Saltash have from time immemorial, without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo*, mentioned in the statement of claim from the 2nd day of February in each year, to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint for sale and otherwise. The acts complained of were done in the exercise of the privilege.” That was on the case stated, and was the common case of both parties, and the only question in the case was whether as against a several fishery existing in the Mayor and Corporation of Saltash, such a claim was, on these facts, one which could be legally supported. It was held from time immemorial; it was without interruption; it was claimed as of right, and the acts were done in exercise of that privilege. The class of persons who claimed that right were not inhabitants, occupiers, or burgesses of Saltash, but it was “the free inhabitants,” whatever that may mean, “of ancient tenements in the borough of Saltash.” In the House of Lords the decision of the Court of Appeal was reversed on the ground (as put by all the Law Lords, with the exception of Lord Blackburn, who dissented) that if the custom or practice stated in paragraph 9 of the special case could have had a legal origin, the House of Lords were bound to give effect to it, and that it could, in the opinion of their Lordships, have had a legal origin. Baggallay, L.J., who dissented from the view of the Court of Appeal, had decided the case, not upon the ground that any such claim as that put forward by the appellants in the case, viz. that a claim of free inhabitants could exist as a legal claim, but upon the ground that the practice there stated was inconsistent with the existence of a several fishery on the part of the corporation.

That was not the view taken by the House of Lords. Lord Selborne says (p. 638):—“The right to fish for oysters in the *locus in quo* was exercised by the corporation and its lessees for nearly 200 years before the commencement of this action, without any other qualification than that of usage in favour of the free

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inhabitants of ancient tenements within the borough, on which the appellants rely. If that usage can be reconciled with the existence and enjoyment by the corporation of a several oyster fishery, the right of the corporation to such several fishery is established. . . . The question being, as I have said, what is *reasonably* possible, it appears to me to be reasonable to presume in favour of such user as is proved in the present case, that the grant to the free burgesses of Essa (the ancient name of Saltash) of this several fishery, proved only by prescription, and also proved to have been immemorially enjoyed (at certain times and in a uniform manner) by the free inhabitants of ancient messuages within the borough, was originally made to the corporation upon condition, and for the purpose, that it should be so enjoyed. I think that such a presumption is not only reasonable in law, but probable in fact." He then goes on to consider how that trust could be worked out, and he solves it by deciding that he might support it as being a charity, or analogous to the case of charities, and then he says:—"That user taken as a whole, appears to me to establish a title in the respondents to a several fishery: not, however, an absolute and unqualified title for their own sole benefit, but one qualified by a trust or condition in favour of the free inhabitants of ancient tenements within the borough, in accordance with the usage stated in the 9th paragraph of the special case."

Lord Cairns adopts the same grounds. He says: "Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not, in any way, infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities."

The judgment of Lord Blackburn is a very learned and elaborate treatise on the law, but was not that which the House adopted. Lord Watson then gives his opinion, and he decides

against the existence of the several fishery. Then comes the judgment of Lord Bramwell, who does not decide the case on the ground that there could be a charitable trust; but on other considerations. He says: "If, therefore, the appellants can have such a right, we ought to say they have it. I think they can have it, not as a right by prescription *in alieno solo*, but on other considerations . . . If I am asked whether I believe there was such a grant with such an exception as I have supposed, I answer, I believe in the exception at least as much as in the grant. If such a thing could not be, then I would much rather believe, and find that the corporation had no title, but had from time to time encroached on the public except in so far as the appellants and their predecessors had withstood them. In either view, I think, the appellants are entitled to our judgment." That is the decision in the case.

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Being a decision of the House of Lords, *Goodman v. Mayor, &c. of Saltash* (1) must be taken to have conclusively established the proposition that in some way, whether by analogy to the law applicable to charities, or by way of exception from the grant, a several fishery for oysters (and there can be no distinction which would render the decision inapplicable to a salmon fishery) may be held subject to the right of a fluctuating and unincorporated body of persons, such as "the occupants of ancient tenements in the Borough of Saltash," to fish therein for all time, even to the extent of the possible destruction of the fishery.

Previously to that decision it had been generally (no doubt erroneously) supposed that such a claim would have transgressed the rule against perpetuities, except only in the case of charities, and (also no doubt erroneously) that a perpetual right of fishing for profit, not limited to poor persons, and altogether independent of the question of their means, could not be supported as a charity; and it still may be that this latter question is not finally closed as to Ireland. It was, I think, also supposed that a several fishery involved the right to exclude all persons except those who owned it; and while, of course, a several fishery may be held in trust for any person or persons who might be capable of being

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cestuis que trust of other descriptions of corporeal and incorporeal hereditaments, it could not be subjected to a burthen in the hands of the beneficial owners practically inconsistent with its enjoyment by them. Such ideas, however, are now known to be incorrect; and *Goodman v. The Mayor of Saltash* (1) is to be understood as having either changed the law on the subject, or explained it in a sense not before universally understood. The only question for me is, therefore, does the present case as it stands upon the evidence fall within the principle?

It is on this part of the case that the importance of the Inquisition of 1607, to which I have referred, arises. It is obvious that the finding that the commons of Inistioge were in the habit of fishing in the place in question, if it were independent of its context, would be some evidence that persons other than those deriving under the Butler title had made a practice of taking fish, which would have been some evidence going to negative the existence of a several fishery. But, coming as it does in immediate connexion with the finding that there was a several fishery there, the two findings must be taken together; and the question is at once raised, what is the effect of this statement, taken in relation to the other evidence in the case, in its bearing not on the question whether there was or was not a several fishery, but whether the several fishery found to exist was or was not subject to any trust or limited by any exception in favour of a class of persons who would include the present defendants?

The finding is "*solent*." While on the one hand the practice or habit is not said to be illegal, neither *vi*, nor *clam*, nor *precario*; on the other it is not said to be by virtue of any right or title or claim of right. The jurors simply state it as a fact. How long it has existed is not found. Who the "commons of Inistioge" are does not appear. That never was the corporate title of the town. A charter has been put in evidence by the defendants from Alured, Prior of Inistioge, to "our burgesses of Inistioge" bearing no date, but apparently made about 1210, establishing a hundred Court in the town, and granting to the burgesses amongst other things a common of the woods and a common of pasturage over

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the unenclosed lands of the priory, and three acres of land in fee to each burgess, but no mention of any fishery rights whatever. If the word "commons" in the inquisition of 1607 means the same as "burgesses" in the charter of Alured, none of the defendants here has shown any title as coming under that description. The inquisition finds the right of common of pasture, and cutting and lopping of underwood and branches of trees as an existing right in the "burgesses" of Inistioge in accordance with the charter of Alured, though that charter is not referred to. If the burgesses had had *title* to fish we should certainly expect to find it so stated in the inquisition if not in the charter of Alured; and the use of the word "commons" in reference to the habit of fishing would seem rather to indicate that the burgesses as such were not the persons who fished. If "commons" meant "the common people," it would seem as if the reference was to some loose practice by persons not legally defined and not stated to be in exercise of any right. Probably the then owner of the estate was as easy-going in regard to such matters as was Colonel Tighe in the more recent times. It is important, too, to note that in the Royal Charter of James I. (1608) which incorporated the portreeve, burgesses, and freemen of Inistioge with perpetual succession, &c., a common seal, and granted them a fair and market, and power to hold land, &c., there is nothing to indicate that there was any class of persons called the "commons" of Inistioge. Of course the Patent does not confer any fishing or other rights. The borough *may* have been incorporated before the charter of Alured. In none of its muniments, however, is there any trace of any right to fish. In my opinion it would be going a great deal further than I have any warrant for going to hold that the several fishery found to exist in 1607 was at that time subject to any rights either of the public or of any specified or defined portion of the public. On the other hand, if "commons" was a reference to the corporate name of the provost of Inistioge and the burgesses and so-forth, it is to be observed that none of the defendants here have shown in any way that they come within the description of persons who would be members of that class. Besides by 3 & 4 Vict. c. 108, this borough of Inistioge was put an end to, and it appears in schedule I. of that Act under the inaccurate name

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of “ ‘ Mistioge ’ in the co. Kilkenny.” Whether the mistake is one actually on the roll of Parliament or not does not appear, but there is no doubt it is the same place. The property of these boroughs the incorporation of which was put an end to, is dealt with by section 103 of that Act. That section transferred the property they held to Town Commissioners to be appointed under the more recent Act, if any; or to Boards of Guardians; and if the property was for charity it is to be dealt with as provided by sect. 112. Supposing any right of fishing as in *Goodman v. The Mayor of Saltash* (1) had vested in the Corporation of Inistioge on a trust which might be held in accordance with that case to be a charitable trust, that would, no doubt, have been transferred to the Town Commissioners, if there were such; or, if there were not, to the Board of Guardians in the year 1840 or 1841 when that Act came into force. There is no claim now made by anyone deriving under the Board of Guardians or any Town Commissioners since that time. Still, no doubt, this Court would not allow a charitable trust, or indeed any trust, to fail for want of a trustee. Therefore I think the considerations under that statute interpose no difficulty in the way of the defendants if they were in a position to show a good title prior to the Act; but for the reasons I have given I do not think I am in a position to give such effect to the mere statement in the Inquisition of 1607 taken in connexion with the grant by the Crown immediately afterwards.

Another matter relied on by the defendants arises on the form of the lease from Sweet to Joyce in 1714, which I have already referred to. This instrument contains no actual demise of the right to fish; but it clearly amounted to a grant of a license by Sweet to Joyce on condition: the condition being that if he Joyce exercised it, “ provided the said William Joyce uses the fishing,” he is to pay a “ good, fresh, large, tidle, fat salmon,” on the first Wednesday in every Lent, and another on the first Wednesday of every May, or 10s. in lieu thereof; “ and the like rent and duty of salmon in manner as aforesaid, for each and every person not a householder in Inistioge for the time being in his house or otherwise a sojourner, servant, or co-partner, with him, which shall work in cotts

or nett, or fish for salmon," &c., and 5s. for taking any angrell or spent fish. The defendants contend that this shows a consciousness on the part of lessor and lessee, that householders of Inistioge could not be charged for fishing, on the ground (I am asked to say) that they had the right to fish without hindrance. I cannot draw that inference. It was not the man who fished in any case, but Joyce, the lessee, who was to pay the rent or duty of salmon, and the provision in question was probably meant to enable him to employ free of charge householders in Inistioge, or other persons being his own immediate servants or partners, but not to let off the right of fishing to strangers or persons from a distance. The lease is badly drawn, and inaccurately expressed. I am unable to understand it as admitting that the lessor had no right to charge the rent which the lessee bound himself to pay, or to construe it as showing a title in anyone else.

Another matter which was introduced into the case for the plaintiff, and which tended to confuse it not a little, consisted of the proceedings in an injunction suit in Chancery, brought in the reign of Henry 8 by Miles, Bishop of Ossory, and the Baron of Brownsford, and which resulted in a decree of 29th November, 1544, in favour of the plaintiffs in respect of the fishery which they claimed, and which was established as against the defendants, including the Corporation, or by whatever name the inhabitants of Inistioge were known. But it is said by the plaintiff who puts that in that the decree was not in reference to the place in question here at all, but that it was a several fishery lower down in the stream altogether. If this was the same fishery as the one now in question there was a decree establishing the right of the Bishop of Ossory and Baron Brownsford which would put title out of the plaintiff altogether, but if it be not, and if it be a different fishery, but one which overlaps a small portion of this fishery, I cannot understand what the relevancy of it to the present case is. In that suit of 1544 there was a bond given by the Corporation of Inistioge to obey the decree of the Court, and ultimately in 1577, in the time of Queen Elizabeth there was a decree referring to the old record, and the former suit, and stating that the decree was issued until such time as it should be proved that the salt water ebbd and flowed on that portion of the river where the fishery was found to be, and that

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was that they should not fish upon the Nore "from Rynodd unto the town of Inistioge," and then there is an injunction restraining them from fishing within the limits of that fishery "from Rynodd to the town of Inistioge." The defendants relied upon an Act of Parliament which they said gave everyone in Inistioge the right to fish in the river Nore as far as the tide ebbed and flowed, and they said it did ebb and flow at this place, and where everybody knows now that it does ebb and flow twice in every twenty-four hours, but the Commissioners had found the issue in favour of the plaintiff in the case, and that the salt water did not ebb and flow where every human being now knows it did. The defendants relied on an Act of Parliament passed in the twenty-eighth year of Henry 8, and the plaintiff replied that there was no such Act. Considering that the twenty-eighth of Henry 8 was 1537, and that this proceeding took place in 1544, the Act of Parliament must have been then just seven years old at the time, and making every allowance for the irregularity of the disturbed times, one would expect some traces of it, but there is none. I have read through every Act of Parliament in the reign of Henry 8, and there is nothing of the kind. That injunction was either in my opinion wholly founded on a palpable untruth, or it was not concerned with the fishery in question here. The defendants relied on an Act of Parliament which appears to have been invented for the occasion, and if the several fishery there in question was now the same, or partly the same as that in controversy in this suit, enjoyment has not followed the title; indeed it might be said that there has been adverse enjoyment ever since the decree establishing it. If not the same, it is irrelevant. Putting these proceedings, therefore, out of the case, what is the effect of the finding in the inquisition of 1607 in its bearing upon the title claimed by the defendants in the amended defence?

Since it does not find or state or allude to any title in the commons of Inistioge, it must be taken as only a statement of a matter of fact to be taken in connexion with other evidence of facts in the case. Assuming it to be not only evidence but proof of the fact, what does it establish? That in 1607 the commons of Inistioge used to fish in the river, within the several fishery now of the plaintiff, and that, two centuries later, some persons who

lived in the town of Inistioge, and some others who did not, have on some occasions, more or less frequent, more or less precariously, more or less secretly, fished in the same place, but never (till quite recently) to the detriment of the recognised and constantly exercised rights of the plaintiff or of his predecessors.

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In *Goodman v. Mayor of Saltash* (1), the facts conclusively admitted were these:—There was an uninterrupted exercise, as of right, from time immemorial and without any qualification except that it was exercised by free inhabitants of ancient tenements in the borough.

It is only necessary to contrast these admissions with the facts in the present case. The claim of the defendants in the present case, repeated over and over again by themselves and their witnesses, is to a public right. It is not even shown that the defendants as a body are—though some of them may be—within the class or any of the classes of persons in whom the pleading alleges the right to be.

I am of opinion that that defence fails on every ground.

But considering the inquisition in its bearing upon the plaintiff's title, the way it is relied on in reference to the original pleadings is as going to show that there was not in the grantees from the Crown any several fishery at all. I think it plain, however, that I am bound to take the document as a whole. The same inquisition finds that there was a several fishery. If that finding can stand along with the statement contained in the words which follow, I must give effect to it; that is, if it be possible to hold that A. B. has a legal and actual several fishery, but that other persons at a particular time were in the habit of fishing in it, I am bound so to hold. But it is a truism to say that if there be a several fishery it cannot be lost by mere abandonment. In the present case there is no evidence of abandonment at all: quite the reverse. The next day (almost) after the inquisition the Crown grants the several fishery without any reference to the commons of Inistioge, showing the view the Crown lawyers of that day at any rate entertained of the rights ascertained by the inquisition. I have already shown that there has been since

(1) 7 App. Cas. 633.

M. R. no such user by the public or any branch of it as to prevent my
 1896. giving effect to the continuous acts of ownership and enjoyment by
 TIGHE the predecessors of the plaintiffs under their title.

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 SINNOTT. The plaintiffs are entitled to the declaration and injunction
 they claim, with their costs of suit.

Solicitor for the plaintiffs: *Lewis J. Watters.*

Solicitor for the defendants: *P. Chance.*

R. W. L.

Matrimonial.
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SCOVELL v. SCOVELL.

July 13, 22. *Divorce a mensa et thoro—Wilful neglect conducing to adultery—Discretionary
 bar—Exercise of discretion.*

If a husband, by wilful neglect has conduced to his wife's adultery, such conduct on his part constitutes, according to the matrimonial law as now administered in Ireland, a discretionary bar to the granting of a divorce *a mensa et thoro*.

Such wilful neglect, even when it has conduced to adultery, is not however an absolute bar to relief: it rests in the discretion of the Court (1).

PETITION by husband for a divorce *a mensa et thoro*, on the ground of the adultery of the wife.

The facts of the case, for the purposes of this report, are sufficiently stated in the judgment.

Samuels, Q.C., and *Pigot*, for the petitioner.

There was no appearance for the respondent.

(1) The principle that such conduct constitutes a discretionary bar, as thus stated by the President (Warren, J.), was adopted by Lord Herschell in his speech to the House of Lords on Scovell's Divorce Bill; *ex relatione* Samuels, Q.C.

As to the view of the facts taken by the House of Lords, see Weekly Notes, 1896, p. 60.—[REP.]

THE PRESIDENT :—

This was a petition by Mr. George Scovell for a divorce *a mensa et thoro*, from his wife, Vivienne Scovell. The petition is founded upon the alleged adultery of the respondent with a Mr. Tombe at Chester, in April, 1895, and at various places since that date.

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The marriage of the parties in October, 1892, and adultery, as alleged in the petition, were proved. Mr. Tombe and Mrs. Scovell arrived at the Queen's Hotel, Chester, at two o'clock, A.M., on the morning of the 8th of April (identified by photographs). Mr. Tombe engaged a bedroom and dressing-room, wrote in the visitors' book "Mr. and Mrs. Tombe"; the chambermaid took tea to the room that morning and the following one, and saw the supposed Mr. and Mrs. Tombe in the same bed.

This was the petitioner's case: the respondent did not appear. *Prima facie*, the petitioner appears entitled to the decree for which he prays. But it is a principle of natural justice that if a husband, by reckless conduct and wilful neglect, has conducted to the fall of his wife from virtue, he is not entitled to any relief for that misconduct. This moral principle has received a legal sanction in the English Matrimonial Causes Act, 1857, which enacted (sect. 31) that the Court *shall not be bound* to pronounce a decree for dissolution of marriage "if the petitioner shall in the opinion of the Court have been guilty of such wilful neglect or misconduct as has conducted to the adultery." An instructive reading on this section will be found in Geary on the Law of Marriage, p. 297. It is true this section does not apply directly to this Court; but I think that the principles of divorce law incorporated in this statute apply to Ireland indirectly, in favour of natural justice. For instance, prior to this Act a wife was not entitled to a dissolution of her marriage by reason of the adultery and cruelty of her husband; but the same statute, in sect. 27, gave this right to a wife in the English Court, and the House of Lords applied this principle to an Irish case: *Re Westropp's Divorce Bill* (1), where, first in this country and afterwards before the House, it was proved that the husband had been guilty of both adultery and

(1) 11 App. Cas. 294.

Matrimonial. cruelty, and dissolution was granted, Lord Blackburn observing
 1895. (p. 297)—“Whenever that is proved, which in a Court of law in
 SCOVELL England would be held to be a sufficient ground for a divorce, that
 v. is sufficient ground for this House to pass a divorce bill relating
 SCOVELL. to Ireland, where the Divorce Act does not apply.” In my
 opinion it follows, that this Court is entitled to apply the principle
 of discretion in cases where the husband’s wilful neglect has con-
 ducted to the adultery of a wife, to proceedings by the husband
 for a divorce *a mensa et thoro*.

The question of fact, then, arises—has Mr. Scovell been guilty
 of such wilful neglect (and recklessness may be wilful neglect) as
 has conducted to the adultery proved in this case?

It is important to observe that the only act of adultery which
 I have to consider is that which occurred at Chester in April,
 1895. There is no charge or evidence of adultery prior to the
 transaction at Chester. The petition does not contain any such
 charge; and neither the petitioner in the witness-box, nor his
 counsel at the bar, suggested an earlier fall from virtue. This
 transaction took place a few weeks after the petitioner went to
 India, leaving his wife in Ireland. This circumstance is impor-
 tant, having regard to a case of *St. Paul v. St. Paul* (1).

The respondent, at the time of her marriage, was 17 or 18
 years of age, a child in years, and without experience of the wiles
 and treachery of men, requiring in a large measure that support
 and protection which are the first duties of a husband to a wife.
 Did Mr. Scovell discharge this duty, or did he neglect it, and
 thereby conduce to the adultery of his wife? I have read with
 care the shorthand writer’s note of Mr. Scovell’s evidence. The
 unsatisfactory manner in which he gave his testimony, with much
 assistance from his counsel, deeply impressed me; and when I
 consider his account of their life in Florida, during the yachting
 excursion, and at Mr. Tombe’s house, and how he observed and
 contrasted her cold manner to himself, and her pleasant demeanour,
 “very pleasant,” to Mr. Tombe and other men, and above all,
 his departure from this young woman for India, without having
 made any arrangements with friends or relations for her pro-

(1) L. R. 1 P. & M. 739.

tection, as he admitted, during his absence in that distant land, I have come to the painful conclusion that Mr. Scovell was guilty of neglect which did conduce to his wife's adultery. The respondent did not appear, and of course was not examined; but Mr. Scovell's counsel read in evidence letters containing her account of some part of the transactions, and which, being thus in evidence, corroborate my opinion. In one she writes :

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"DEAR GEORGE,—In answer to your letter received yesterday, I have already written to Aunt Emma declining her kind invitation to stay with her pending some arrangement. Until something is settled I must decline to accept any favours from my relations. As regards the other alternative you propose, last week at Hollywood I was willing and asked you to remain there with me until something could be settled. This you absolutely refused to do, telling me distinctly that you neither cared nor minded what course I pursued in the future, or what became of me, besides saying many insulting things. The only possible excuse I can make for you is that you were irresponsible for your actions. After this, and your other violent behaviour towards me, I do not see that you can expect me to reside with you again; nor can I understand this sudden and entire change of front. I need not add how much I regret that the course you have chosen to pursue has obliged me to act as I have done; but alas, I see no other alternative."

This was written a week after the visit to Mr. Tombe's house had terminated. Mr. Scovell replied, but there was no evidence of the contents of his letter. Shortly after this, Mr. Scovell met an accident, and the respondent wrote again :

"DEAR GEORGE,—I was sorry to hear of your accident. With regard to living with you, I have already given you my answer. I should imagine by this time you would see how utterly impossible it is, and how it could only lead to further misery. My present intention is to go down to Sligo, probably beginning of next week. As to what you say about paying for my support here, it is now three weeks since we parted, and during that time I have not asked you to contribute anything to my maintenance. I suppose it is useless to add how much I regret the course your conduct has driven me to take."

Mr. Scovell, as to some of these statements, said *he could not recollect*; others he denied; but I attach little importance to his contradiction, even when precise. In this last letter there is an allusion to the maintenance of the respondent. I do not understand that Mr. Scovell made any arrangement on this subject, a

Matrimonial. matter so necessary for her protection during his prolonged and distant absence.

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Such, then, being my conclusions upon the questions of law and fact involved in the case, what is the duty of the Court? Under the English statute, and, as I think, the law of this Court, wilful neglect, even when it has conduced to adultery, is not an absolute bar to the husband's relief; the words are: "the Court shall not be bound." Relief rests in the discretion of the Court.

I am inclined to think that if this was a suit for dissolution of marriage, I would exercise my discretion by dismissing the petition; but this Court has no such jurisdiction, and I think I shall best exercise my discretion, in a case where the relations of the parties have been so miserable, by making a decree for separation, *i.e.* for divorce *a mensa et thoro*. If the petitioner shall proceed to seek a dissolution elsewhere, I have no doubt but that his conduct will be satisfactorily investigated before the august tribunal which alone has jurisdiction to decide this question in this case.

Decree for divorce a mensa et thoro.

Solicitor for the petitioner: *R. W. Peebles.*

R. W. L.

IN THE GOODS OF WALSHÉ.

Probate.
1896.*Practice—Resealing letters of administration—Form of certificate—20 & 21*
Vict. c. 79, s. 94. June 22.

In order to reseal an English grant of letters of administration of the estate of an intestate, who at her death held no property in Ireland except as trustee, there must, in order to satisfy the provisions of the 94th section of the Probate Act (20 & 21 Vict. c. 79), be a certificate from the Registrar in England explicitly stating that bond has been given to cover the whole of the amount of assets in Ireland.

MOTION.

Margaret Walshe died at Wavertree, near Liverpool, on the 10th April, 1895, and on the 6th May of the same year letters of administration of her personal estate and effects were granted to Rev. Thomas Walshe, forth of the District Probate Registry at Liverpool. The gross value of the personal estate of the deceased was sworn to amount to £10 and no more, such estate being wholly situate in England.

By his will, dated the 14th March, 1872, Maurice Walshe (the husband of Margaret Walshe) bequeathed all his property, consisting of ten preference shares in the Waterford and Limerick Railway Company, and mortgage bonds for £850 in the Waterford and Central Ireland Railway, and certain chattels in Ireland to his wife, Margaret Walshe, upon trust for his four children to be divided among them as she should think proper, and appointed her executrix of his will. He died on the 5th June, 1872, and probate of his will was granted to his wife, Margaret Walshe, forth of the District Registry at Waterford. She acted as trustee under the will, and in 1875 received £350 portion of the said £850, and the mortgage bond for that sum was cancelled, and a new bond was issued in the name of Margaret Walshe, and was so held at her death. The preference shares of the Waterford and Limerick Railway Company were converted, and stock was issued in lieu thereof to Margaret Walshe, and stood in her name

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at her death. Margaret Walshe had no beneficial interest in the bond or stock. The Rev. Thomas Walshe, her executor, was one of the children of Maurice Walshe and a beneficiary under his will. The Registrar in Liverpool certified that letters of administration to Margaret Walshe had been granted at the District Probate Registry at Liverpool, and "that bond has been given to the President of the Probate Division of the High Court of Justice in England in the sum of £20, the same being sufficient in amount to cover the personal estate of the said deceased in England." He refused to give a certificate that bond had been given to cover the whole of the assets standing in Margaret Walshe's name in Ireland. The proper officer in Ireland refused to reseal the grant without such certificate.

An application was made to the Court that the grant of administration of the personal estate of Margaret Walshe to the Rev. Thomas Walshe should be resealed in Ireland, notwithstanding that security had not been given to the amount of the stock and bonds held by the deceased as trustee.

Philip White, in support of the application :—

The certificate is in the proper form, because there are no assets in Ireland, and it is not necessary to have a statement in the certificate explicitly dealing with Irish assets, unless there are in fact Irish assets. We are therefore entitled to reseal the grant.

THE PRESIDENT :—

The jurisdiction and duties of this Court on the subject of re-sealing English grants depend on the 20 & 21 Vict. c. 79, sect. 94, and 22 & 23 Vict. c. 31, sect. 25.

The former section enacts : "From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to, and a copy thereof deposited with, the registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last mentioned Court, and being duly stamped shall be of the like

force and effect, and have the same operation in Ireland as if it had been originally granted by the Court of Probate in Ireland.”

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This probably left to the Irish Court the duty of considering whether the English grant was or was not duly stamped, but the second statute further enacts, “Letters of administration granted by the Court of Probate in England shall not be resealed under section 94 of the 20 & 21 Vict. c. 79, until a certificate has been filed, under the hand of a registrar of the Court of Probate in England, that bond has been given to the Judge of the Court of Probate in England in a sum sufficient in amount to cover the property in Ireland as well as England, in respect of which such administration is required to be resealed.” Therefore the jurisdiction of this Court, whether judicial or ministerial, requires as a condition precedent to resealing the certificate mentioned in the Act.

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The certificate produced is not the certificate required as a condition precedent, and I therefore refuse this motion.

It is not my duty to express or form an opinion upon the act of the English officer. If he is wrong in refusing to give a certificate taking notice of Ireland, he may be set right by the English Court. If he is right the present applicant can get an Irish grant suited and adequate to the circumstances and necessities of the case.

No question arises here whether the jurisdiction of this Court is judicial or ministerial: see *Mahon v. Hodgins* (1).

Solicitors for the applicant: *V. B. Dillon & Co.*

R. W. L.

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July 24.

KINGHAM, DECEASED ; KINGHAM v. KINGHAM.

(1896. No. 542.)

Will—Rule against perpetuities—Void bequest—Liability of tenant for life in occupation of leaseholds for repairs and outgoings—Direction to settle shares bequeathed to testator's daughters.

Testator by his will bequeathed a sum of £2000 to the trustees of the General Assembly of the Presbyterian Church for the erection of a mission hall, and if the trustees of certain premises called the Bethel would sell them, and hand the amount received to the trustees for purposes specified in the will, then the testator further devised certain freehold property to said trustees of the General Assembly:—

Held, that the devise was void for remoteness.

Testator directed his executors and trustees to allow his wife, if she pleased, to occupy his house during her life, with the use of the furniture, and after her death the same might be sold and the proceeds divided among testator's children:—

Held, that the widow was liable to pay all headrent and taxes payable in respect of the period during which she occupied the premises, and to keep them in such repair as a tenant would be liable for in the absence of express contract; and that it was the duty of the trustees, but not of the widow, to keep the premises sufficiently insured against fire.

Jeune v. Baring ([1893] 1 Ch. 61) not followed.

Testator declared that any money to which any daughter should become entitled under his will should be settled free from any liabilities of any other person, and with full power of willing same on her decease:—

Held, that each daughter's share should be settled upon her for her separate use, with restraint on anticipation, and with power to dispose of same by will; and in default of such disposition to such daughter's next-of-kin as if she had died unmarried.

ADJOURNED SUMMONS.

John Kingham, of Altoona, Windsor-avenue, Belfast, by his will dated the 28th July, 1894, bequeathed to the Trustees of the General Assembly of the Presbyterian Church in Ireland the sum of £2000 for the erection in some central place in Belfast, or for the purchase in such a locality of a suitable building, to be designated the Kingham Mission Hall for Deaf and Dumb.

If the trustees of the Bethel in Sandy-row would sell these premises and hand the amount received for same over to the trustees of said Assembly then testator further bequeathed the property he held in Drew-street, Belfast, to the Assembly trustees to assist in paying a suitable salary to a missionary to be appointed.

The will contained a residuary clause under which testator's children took equally.

Testator directed his executors to allow his wife, if she pleased, to occupy his house during her life, with the use of the furniture, and after her death or on her vacating it, directed that the same might be sold at such time as his executors should judge best, and the proceeds added to other moneys in their hands for division among testator's children.

Testator declared that any money to which any daughter of his became entitled under his will should be settled upon herself, and free from any liabilities of any other person, and that she should have full power of willing same on her decease.

The executors applied on originating summons, under Order LV., Rule 4, in which four of the next-of-kin and legatees under the will were named as defendants, for an order determining (amongst others) the following questions affecting the rights of the legatees and next-of-kin:

I. Must the trustees of the Bethel in Sandy-row sell within any and what period to bring into operation the contingent bequest of the Drew-street property?

II. Is the testator's widow while she occupies his dwelling-house liable to pay the headrent, taxes, fire insurance premiums, and repairs, and if not, out of what fund are they or such of them as are not payable by the widow, payable, and are the executors to set aside any fund for this purpose?

III. Do the testator's daughters take an absolute interest in their shares, and if not what interest do they take, and if a limited interest, to whom do their respective shares go on the cesser of such limited interest? And have the executors of the deceased power to settle the testator's daughters' shares on any and what trusts?

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On Question I.—

Price, Q.C., for Mary Davidson Kingham, John Richard Kingham, and Samuel Marcus Kingham, three of the children and residuary legatees of the testator:—

The devise of the Drew-street property is void for remoteness. The event on which it is to take effect might happen at any period, however remote. There is no express gift in the event of the trustees of the Bethel not selling: *Company of Pewterers v. Christ's Hospital* (1).

Blood, for the trustees of the Bethel:—

The trust deed of 24th January, 1878, gives the trustees of the Bethel a power of sale, and they are prepared to sell forthwith and so fulfil the condition contained in the testator's will. Is the gift so remote that effect cannot be given to it? This is always a question for the Court: *In re White's Trusts* (2), *Chamberlayne v. Brockett* (3). The present case is not like *Alt v. Lord Stratheden and Campbell* (4), where the gift was clearly bad. No authority is to be found where a condition such as this has been held to violate the rule against remoteness.

Meredith, Q.C., for William J. Kingham, the eldest son of the testator, cited *London & South Western Railway Company v. Gomm* (5). The gift to be valid must necessarily vest within the limit allowed by the rule against perpetuities. In *In re White's Trusts* (2) the question of remoteness did not arise. There the gift was to a non-existent charity.

THE VICE CHANCELLOR:—

I must hold that this is not a valid devise on the ground that the condition on which it is given is not necessarily to be performed within the time allowed by the rule against perpetuities. If authority were necessary, the case of *Alt v. Lord Stratheden and Campbell* (4)

(1) 1 Vern. 161.

(2) 33 Ch. D. 449.

(3) L. R. 8 Ch. App. 206.

(4) [1894] 3 Ch. 265.

(5) 20 Ch. D. 562.

is in point. The rule against perpetuities always requires that the property dealt with *must* vest within the limited time.

The trustees of the Bethel are entitled to their costs out of the general assets.

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On Question II.—

J. H. Moore, for the widow, contended that the headrent, taxes, repairs, and insurance premiums of the house which she was entitled to occupy were payable out of the income of the residuary estate, and referred to *Jeune v. Baring* (1) and *In re Courtier* (2).

Price, Q.C., for the residuary legatees, and *Meredith, Q.C.*, for the eldest son :—

The widow is liable to pay for ordinary tenant's repairs during her occupation, and also the headrent and taxes. It is admitted that the widow is not bound to pay premiums on fire insurance. The decision in *Jeune v. Baring* (1) appears to have been the result of a misconception of the decision in *In re Courtier* (2), and should not be followed.

THE VICE-CHANCELLOR :—

There can be no doubt that the decision of *Kekewich, J.*, in *Jeune v. Baring* (1) goes the length contended for by *Mr. Moore*. I am, however, unable to concur in the view there taken by the learned Judge of the case of *In re Courtier* (2), on the authority of which he, apparently with some reluctance, felt bound to decide the case before him. He was of opinion that the question was the same in both those cases; but, in my opinion, the decision of the Court of Appeal in *In re Courtier* (2) does not rule the present case. There the question decided was that on a bequest of leaseholds to the testator's wife for life there was no obligation on her to put the premises into such a state of repair as to comply with the covenants in the leases under which they were held.

I do not feel it necessary to go through the *dicta* of the learned Judges who decided *In re Courtier* (2), which I think must be

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taken as applying only to the question before them, which was as to the liability of the tenant for life to restore premises which had been allowed to get into disrepair before her tenancy for life began. Here the question is as to the liability of the tenant for life to keep the premises from getting into disrepair during her own possession. I venture to differ from Kekewich, J., in regarding the decision of *In re Courtier* (1) as in effect concluding the question which was before him, and is now before me. I am of opinion that a tenant for life, whether legal or equitable, is within the maxim, *Qui sentit commodum sentire debet et onus*: that he is bound to take the *onus* with the *commodum*, and that as headrent and taxes are ordinary burdens which a tenant in occupation of leaseholds must bear, the testator's widow is liable to pay them out of her own money during her occupancy. There is nothing in the language used by the testator to alter this liability.

I think there is a distinction to be taken between the payment of rent and taxes and of the premium of fire insurance, because an ordinary tenant is not bound to keep premises demised insured against fire in the absence of express contract or obligation. I think the trustees are bound to take care that the premises are insured against fire, so as to preserve the property for their *cestuis que trust*, and that they cannot require these premiums to be repaid them by the widow. The other matter is as to repairs. In my opinion this lady is not liable to pay for any repairs which became necessary before her occupation. The repairs she will be liable for are such as an ordinary tenant would be bound to make on the premises by his common law obligation. I shall therefore declare that the widow is liable to pay all headrent and taxes ordinarily paid by an occupying tenant, and to pay for all repairs and damages to the premises which have accrued, or shall accrue, during her occupation, such repairs to be confined to those for which an occupying tenant is ordinarily liable in the absence of express contract, and that she is not liable to any outgoings save those above-mentioned; and that it is the duty of the trustees to keep the premises sufficiently insured against fire, and to perform all necessary repairs other than those above specified.

On Question III.—

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J. H. Moore submitted that the testator's daughters took absolutely, and cited *Loch v. Bagley* (1).

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Meredith, Q.C. :—

The daughters take for life with power of disposition by will.

THE VICE-CHANCELLOR :—

There is an indication given by the testator of the kind of settlement he intended, for he gives to his daughters a power to dispose of their shares by will.

I rule that the daughters take the entire interest in their respective shares, subject to same being settled on each for life for her separate use without power of anticipation, and on her death her share is to be held in trust for such person or persons as she shall by will appoint, and, in default, for her next-of-kin as if she had died unmarried.

Solicitors for the executors: *Carson & M'Dowell*.

Solicitor for the residuary legatees: *J. O. Lytle*.

Solicitor for the trustees of the Bethel: *Gerald Howe*.

Solicitor for the heir-at-law: *R. T. Martin*.

T. H. M.

(1) L. R. 4 Eq. 122.

M. R.
1896.

June 30.
July 7.

IN RE RICHVIEW BRICKWORKS CO., LIMITED;
EX PARTE BAILEY.

(1894. No. 426.)

Company—Winding-up—Bull-holders—Specific appropriation of title deeds for payment of bills—Deficient security—Rule in Ex parte Waring.

The decision in *Powles v. Hargreaves* (3 DeG. M. & G. 430), that the rule in *Ex parte Waring* (19 Ves. 344) extends to a case where the security is insufficient to meet the full amount of the bills, applies in Ireland.

SUMMONS.

This was an application on behalf of Edward Bailey, the liquidator of the Company, for directions as to the disposal of a sum of £3680 in his hands, representing the proceeds of the sale of the Company's freehold property, goodwill, and moveable effects, and, in particular, as to the parties entitled to the balance of the said sum, after deducting therefrom certain charges incurred in the course of the liquidation.

The facts of the case, as stated in the affidavits, are as follows :—

The Company was incorporated, under the Companies Acts, on December 15th, 1892, for the purpose of acquiring the business and premises of Patrick Crean, brick manufacturer, at Richview, in the city of Belfast. The purchase-money of the business and premises was £10,400, which was to be paid by bills drawn by Patrick Crean upon and accepted by the Company. After the formation of the Company, Patrick Crean became a director thereof; and the bills for the purchase-money were drawn by him upon and accepted by the Company. Patrick Crean was, at the time, largely indebted to the Belfast Warehouse Company, and the bills were indorsed by him, and handed over to the Belfast Warehouse Company for credit of his account with that Company. The premises of the Richview Brickworks Company consisted of 10A. 30P., held in fee-farm by two grants, dated December

1st, 1852, at the aggregate yearly rents of £300. In addition, the Company were bound by deed to take in fee-farm, as from the 1st May, 1896, a further piece of ground adjoining their works, containing 2A. 28P., at the rent of £65 5s. On the Company's works there were a manager's dwellinghouse, offices, and stabling, a steam-engine and boiler, two pug-mills, with driving-gear and drying-sheds connected therewith, clay-rollers, cutting-tables, brick-dies, hauling gear, shafting and gearing; besides other small plant and working utensils. The two fee-farm grants of the 10A. 0R. 30P., with the conveyance thereof, dated March 3rd, 1893, were, on March 4th, 1893, deposited by the Company with James Steen Boyd, the managing director of the Warehouse Company, as security for the payment of the Company's acceptances for the purchase-money held by him, pursuant to a resolution to that effect passed at a meeting of the directors of the Company, on the motion of the chairman, and seconded by Crean. The bills were discounted by the Warehouse Company with various banks, and afterwards renewed from time to time by Crean, and indorsed by him to the Warehouse Company. The Warehouse Company had placed to the credit of Crean the proceeds of the unpaid bills given him by the Richview Brickworks Company in payment of the purchase-money; but the bills as they fell due, and the renewed bills given in substitution therefor, were charged and credited by the Warehouse Company to an account opened in the name of the Richview Brickworks Company. Crean was indebted to the Warehouse Company in bills drawn by the Richview Brickworks Company and accepted by him, which bills were discounted by the Warehouse Company.

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Co.;
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In April, 1894, the Warehouse Company went into voluntary liquidation, and, as a result, the Richview Brickworks Company also went into voluntary liquidation, and, on June 22nd, 1894, an order was made by the Master of the Rolls continuing the winding up of the Brickworks Company under the supervision of the Court, with Mr. E. Bailey as liquidator. A similar order had been made by the Vice-Chancellor as to the Warehouse Company, with Mr. J. O. Waller as liquidator.

Crean presented a petition for arrangement in the Belfast local Court of Bankruptcy, and carried and paid a composition of one

M. R. shilling in the pound. He returned, amongst his creditors, the
 1896. Belfast Banking Company, the Bank of Ireland, Northern Bank-
In re ing Company, the International Bank of London, and Messrs.
 RICHVIEW Jaffe Brothers—the parties who were holders of his drafts on the
 BRICKWORKS Co.;
Ex parte Brickworks Company, and accepted by them.
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Crean was afterwards obliged to stop payment again, and made an arrangement with his creditors, by which he assigned all moneys and property which should come to him in respect of the purchase-money of the Brickworks Company to D. B. Alexander in trust for his creditors generally. The property of the Brickworks Company was sold by order of the Court on October 4th, 1895, as one lot, for £3680, of which £358 3s. 4d. was for moveables, leaving a balance of £3321 16s. 8d.

The liquidator of the Brickworks Company incurred divers expenses in preserving the property of the Company and carrying on the business, and bringing the property to a sale; and on May 18th, 1896, he took out this summons, asking to be allowed to retain his said expenditure out of the purchase-money, and asking directions as to the disposal of the balance. The liquidator of the Warehouse Company claimed on behalf of the banks and others who had discounted the bills to have the balance appropriated towards payment of the amounts due to them on account of the bills. Crean, on the other hand, claimed to have a lien on the balance for the purchase-money.

He also stated that the holders of the bills had received the sum of £520 by way of composition on the amounts proved by them in his arrangement matter; and, in the alternative, submitted that he was entitled in priority to any other person, save the liquidator, to the sum of £520 and the proceeds of the sale.

Serjeant Dodd, Q.C. (Jefferson with him), in support of the summons:—

The holders of the bills are entitled to have the balance of the proceeds of the sale of the Company's property, after deducting the expenses incurred by the liquidator, applied towards payment of their claims, on the principle laid down in *Ex parte Waring* (1),

which is law in Ireland: *In re Belfast Warehouse Company, Ex parte Carmichael* (1); though in that case it was held not to apply, as there were not two judicial insolvencies. The principle of *Ex parte Waring* (2) applies to a case like the present, where the security is insufficient to pay the full amount of the bills: *Powles v. Hargreaves* (3) decided in England, and followed by the Court of Bankruptcy in Ireland in *Re M., an Arranging Debtor* (4). The title-deeds of the Brickworks Company were deposited with the Warehouse Company as security for their acceptance of Crean's drafts, and therefore the proceeds of the sale of the property should be appropriated towards payment of the bills.

The case in the House of Lords of *The Royal Bank of Scotland v. The Commercial Bank of Scotland* (5) may be relied on to show that the principle of *Ex parte Waring* (2) does not apply when the security is deficient, but it only decided that the principle of *Ex parte Waring* (2) would not be applied to Scotland.

The principle of *Ex parte Waring* (2) is adopted by Lord Hatherley in *City Bank v. Luckie* (6), and by James, L. J., in *Ex parte Smart, In re Richardson* (7), and treated as binding by the House of Lords in *Banner v. Johnston* (8).

Carton, Q.C. (*M'Gonigal* with him), for Patrick Crean:—

(a). The vendor had a lien for unpaid purchase-money, which was not waived by the taking of bills, nor by allowing the title-deeds to be deposited with the acceptors, the Warehouse Company, as they had notice that the purchase-money was not paid: *Ex parte Loaring* (9); *Grant v. Mills* (10).

(b). The rule in *Ex parte Waring* (2) should not be applied to the case of a deficient estate: *Royal Bank of Scotland v. Commercial Bank of Scotland* (5), which overrules *Powles v. Hargreaves* (3) on this point.

(1) *Ante*, p. 124.

(2) 19 Ves. 344.

(3) 3 De G. M. & G. 430.

(4) Ir. R. 11 Eq. 193.

(5) 7 App. Cas. 366.

(6) L. R. 5 Ch. App. 773.

(7) L. R. 8 Ch. App. 224.

(8) L. R. 5 H. L. 157.

(9) 2 Rose, 79.

(10) 2 Ves. & B. 306.

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J. H. Moore, for the liquidator of the Warehouse Company :—

The bill-holders, to whom the Warehouse Company indorsed the bills, are entitled to the equity given by the rule in *Ex parte Waring* (1).

The application of *Powles v. Hargreaves* (2) in Ireland was recognised in the judgment of the Court of Appeal in *In re Belfast Warehouse Company, Ex parte Carmichael* (3), although it was decided that *Ex parte Waring* (1) did not apply for other reasons.

Crean allowed the title-deeds to be deposited with the Warehouse Company, and cannot now claim a lien : *Cood v. Cood* (4).

A. H. Bates, for the Belfast Banking Company.

J. Herbert Shaw, for the Bank of Ireland and International Bank of London.

July 7.

THE MASTER OF THE ROLLS :—

The point remaining for decision is as to the application of the rule in *Ex parte Waring* (1) to the present case ; for as to the claim to lien I remain of the opinion which I intimated during the argument, that it is impossible for Mr. Crean's creditors to sustain a claim for lien in respect of unpaid purchase-money. No doubt the mere taking of bills for purchase-money will not of itself discharge the vendor's lien. But Mr. Crean was himself a director of the Brickfield Company, and actively concerned in the transfer to the Warehouse Company of the title deeds as security for the payment of the bills which had been drawn by him and accepted by the Brickworks Company, and discounted by the Warehouse Company. Till the bills are paid in full, at any rate, I think it clear that Crean or his creditors cannot assert any claim to the money which represents the lands.

As to *Ex parte Waring* (1), really only one question was argued before me, and that was whether the doctrine of that case applies in Ireland, when the security in the hands of the acceptor of the bills is (as in the present case) less in amount than the bills

(1) 19 Ves. 345 ; 2 Rose, 182.

(2) 3 De G. M. & G. 430.

(3) *Ante*, p. 124.

(4) 10 Price, 109.

it was intended to secure. I mean, it was not contended that the principle will not apply in the case, not of bankruptcy or insolvency, but of the winding up of insolvent companies; and it is admitted that not only are both the Brickworks and the Warehouse Companies in that condition, but Crean is arranging under the Court. The fact too that the deposit of title deeds was made to secure the bills was admitted, and if it had not been, was proved by the minutes in evidence.

As to *Ex parte Waring* (1), it does not as matter of decision, to be found in the words of Lord Eldon's judgment, in terms apply specifically to a case where the security is less than the debt represented by the bills, that is, that case is not specifically and distinctly dealt with in the judgment. On the other hand, the judgment is not in terms confined to cases where the security is greater than or equal to the amount due on the bills; and, in fact, the order in the case does specifically apply to cases where the security is less than the debt: see *Powles v. Hargreaves* (2). Lord Eldon says, at p. 349:—"That doctrine, therefore, not being applicable to this case, the view I have taken of it in other respects is this. The first consideration is, what was the nature of the demand of Bracken and Co., who did not become bankrupt until August, upon Brickwood and Co., at the moment of their bankruptcy on the 7th July? If these bill-holders are to have preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of Brickwood and Co. With regard to the demand of Bracken's house upon the 7th July, it is impossible to deny that if they had either paid, or undertaken to pay, *i.e.* to relieve Brickwood's house from those acceptances, the short bills and the mortgage must have been restored to them. It is, on the other hand, equally clear, that they never could have raised any demand against the house of Brickwood in respect of either the cash balance, the short bills, or the mortgage, without bringing in the amount of those acceptances; admitting, that what the house of Brickwood had of their property in short bills, &c., must be first applied to the discharge of those accep-

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(1) 19 Ves. 345.

(2) 3 De G. M. & G. 430.

M. R. tances for the sake, not of the bill-holders, but of the house of
 1896. Brickwood, who had become liable to them, and had a right to
In re have that liability cleared away before any demand could arise
 RICHVIEW for the Brackens. That then being the equity between these
 BRICKWORKS houses in the interval between their respective bankruptcies, it does
 Co.; not appear to me varied by the bankruptcy of the Brackens in
Ex parte August; supposing their assignees to have put the estate of
 BAILEY. Brickwood in the same situation as the house they represent, if
 solvent, must have done, to entitle themselves to the short bills;
 and, having regard to the demands of all the creditors and the
 bankrupts, in this circuitous way, I think the bill-holders must
 be paid, not as having a demand upon these funds in respect of the
 acceptances they hold, but as the estate of Brickwood and Co.,
 must be cleared of the demand by their acceptances; and the
 surplus, after answering that demand, must be made good to
 Bracken and Co.”

The case of *Ex parte Waring* (1) has always been accepted as binding in Ireland when it applies. Our bankruptcy system is taken from the English, and is the same system save so far as there have been changes of procedure and the like introduced by special legislation. If *Ex parte Waring* (1) is a binding authority in this country for any purpose, it must be binding altogether; that is, to the same extent as it is in England. The case is wholly different in regard to Scotland. The Scotch jurisprudence is a separate and distinct one: derived not from the English common law, but taken directly from the civilians. An English case as such could have no coercive force in guiding the decisions of the Court of Session in Edinburgh. Thus it was that counsel for the appellant in *The Royal Bank of Scotland v. The Commercial Bank of Scotland* (2) had to argue, not that *Ex parte Waring* (1) as explained by *Powles v. Hargreaves* (3) was good law in England, but that it was supported by principle and justice. This the House of Lords, being for the time a purely Scotch tribunal administering only Scotch law, declined to do. Of course such a decision does not determine anything as to English or as to Irish law.

There can, however, be no doubt that Lord Selborne did inti-

(1) 19 Ves. 345. (2) 7 App. Cas. 366. (3) 3 De G. M. & G. 430.

mate pretty clearly that he himself would not have been prepared to agree with *Powles v. Hargreaves* (1). Still he did not profess to overrule that case. On the contrary, he says in a passage I shall quote presently, that it must be treated as law in England.

I confess for myself that with all the deference which a lawyer must feel for the considered view of so great a master as Lord Eldon, I have always been unable to see the necessity or the justice or even the expediency of any such rule as that in *Ex parte Waring* (2) at all. The holder of the bills has by contract no right to the benefit of the security. That is conceded on all hands, and expressly recognised or decided by Lord Eldon in the leading case. He is, apart from bankruptcy (or its equivalent) simply an unsecured creditor. Why, when bankruptcy supervenes, he should be converted into a secured creditor, and so obtain a preference over other creditors equally meritorious with himself, it is hard to understand. No doubt the rule in question is simple and saves trouble in some cases. It seems, however, to be root and branch opposed to the principles now regarded in distributing the assets of bankrupt estates. It is the law, however, in England and in Ireland. No doubt, the holder of the bills, if he lost the benefit of the security, could prove on both estates; and if each paid say ten shillings in the pound, the security being equal to the debt, the result would be the same. But such a state of things must be uncommon; and in the majority of cases the holder of the bills must receive an undue preference. This, however, is the very thing which in my view of it *Ex parte Waring* (2) does; and it is of course too late to re-open the question. *Powles v. Hargreaves* (1) decides with all the authority of one of the strongest Courts of Appeal that ever sat in England, that *Ex parte Waring* (2) extends to cases in which the amount of the debt on the bills exceeds the security. Lord Cranworth there says at page 452:—"With a view of ascertaining exactly what was done in *Ex parte Waring* (2), and whether the order as drawn up in that case would throw light upon the subject, we sent for the order itself. It may, I think, be inferred from the judgment in the report of that case, that the securities deposited were more than sufficient to satisfy the bills.

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(2) 19 Ves. 345.

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I do not know that it distinctly appears in the report, but whether it was so or not is immaterial, because the order itself (which I must assume was very fully considered, for Lord Eldon directed the attention of Mr. Cooke to the mode in which it was to be drawn up) distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient; and expressly provided that if insufficient, the parties holding the acceptances were to prove for the deficiency. Is that at all surprising when we consider the case a little more closely? That of necessity must be the equity; because, when as in the present case the goods were deposited under circumstances that the parties with whom they were deposited had a right to hold them as security, it is to be observed that from the nature of the transactions it was usual either by express contract, or in the course of ordinary dealing with the property, that it should be turned into money; when that is done it is absurd to speak of holding £8000 by way of security for being paid £16,000. That is not the course of dealing. When it is once said that goods or bills are deposited by way of security on a contract that, when the proper time arrives, those securities are to be realized and turned into money, what is necessarily meant is that the money is then to be applied, just as property sold under a power of sale in a mortgage is to be applied, in liquidating the demands for which it is security if sufficient; if not sufficient, in liquidating such demands *pro tanto*."

That was in 1853, forty-three years ago. Has it ever been overruled? Mr. Carton admits that it has not, unless that result is effected by *The Royal Bank of Scotland v. The Commercial Bank of Scotland* (1). Now, no doubt in that case Lord Selborne indicates an opinion adverse to the policy of *Ex parte Waring* (2), as interpreted in *Powles v. Hargreaves* (3). But what was the question before the House of Lords? It was a Scotch case. Admittedly the contention of the appellants, if successful, would have introduced an entirely new practice, till then quite unknown in the law of Scotch sequestrations. One might well doubt the power of even the House of Lords to do that. By calling it

(1) 7 App. Cas. 366.

(2) 19 Ves. 345.

(3) 3 De G. M. & G. 430.

“practice” you don’t alter the fact that the title to thousands of pounds is directly affected.

Lord Selborne says, at p. 386 :—“It is true, as was stated by Lord Cranworth in *Powles v. Hargreaves* (1), that the order in *Ex parte Waring* (2) as drawn up, ‘distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient, and expressly provided that, if sufficient, the parties holding the acceptances were to prove for the deficiency.’ The authority of Lord Eldon in the English Courts of Equity and Bankruptcy was very great; and it is, therefore, in no way surprising that, after the lapse of nearly forty years, the form of order drawn up to carry his judgment into effect should have been regarded as conclusive in a similar case, and should have been (perhaps too readily) assumed to be consistent with the reasons assigned for that judgment. No man could entertain a more sincere respect than I have always done for the very eminent learned Judge who decided *Powles v. Hargreaves* (1); and I assume, for the purpose of the present judgment, that the positive rule of administration which has been accepted as law in England since the order in *Ex parte Waring* (2) was made, must be understood in accordance with the determination in *Powles v. Hargreaves* (1). But, so far as it is a positive rule of administration, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland, merely because it is so in England. Of the reasons assigned by Lord Cranworth to justify the extension of the rule to the case of a deficient security, I cannot but say that they are unsatisfactory to my mind, if applied to such a contract as that between Ramsay and Saunders, in the present case; and indeed they appear to me to overlook the fact that, when the whole benefit of deficient security is given to the bill-holder, the estate of the bankrupt acceptor may lose some part of the indemnity, to which by the contract he is entitled.”

I read that case as deciding nothing as to English law. Lord Blackburn does not profess to do that. Lord Watson does not profess to do so. Lord Selborne assumes that *Powles v. Hargreaves* (1) correctly represents the English practice on the subject. *Powles v. Hargreaves* (1) is therefore unaffected.

(1) 3 De G. M. & G. 430.

(2) 19 Ves. 345.

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M. R. Now if the case of *The Royal Bank of Scotland v. The Commercial Bank of Scotland* (1) had not been decided—or before its decision
1896. —what must have been the action of an Irish Court in reference
In re to a similar case, say the present? I have no hesitation in
RICHVIEW saying that *Powles v. Hargreaves* (2) must have been followed,
BRICKWORKS as a judicial interpretation of the highest character of *Ex parte*
Co.; *Waring* (3), a case always followed and accepted in this country.
Ex parte If so, I have no option now but to declare that the money produced
BAILEY. by the realization of the securities belongs in rateable proportions
to the holders of the bills in question.

Solicitors for the parties : *L'Estrange & Brett* ; *C. E. Buckley* ;
D. McGonigal ; *De Moleyns*.

W. L.

Ross, J. IN THE SEVERAL MATTERS OF THE ESTATES OF JOHN
1896. MURPHY, TRUSTEES OF R. OWEN, TRUSTEES OF
Dec. 13, 17, A. O'REILLY, TRUSTEES OF MARCUS LYNCH.
18, 23.

Land Law (Ireland) Act, 1896, sect. 40—Estates insolvent or under a receiver—Agreements for sale concluded before passing of Act—Court lettings—Solvent estates.

The 40th section of the Land Law (Ireland) Act, 1896, is mandatory in requiring an offer to purchase their holdings to be made to occupying tenants of agricultural or pastoral land, where the estate is insolvent or under a receiver (4). But where, previously to the passing of the Act, agreements for sales to tenants have been concluded, the holdings inspected by the Land Commission, and the Land Commission were ready to make the necessary advances, such cases do not come within the scope of the section, and the agreements may be carried out independently of its procedure.

The provisions of sub-sect. (1) as to the offer of pre-emption do not apply to tenants holding under Court lettings. Sub-sect. (2) is an independent enactment, dealing with this class of tenants as distinct from those within sub-sect. (1) (5).

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| (1) 7 App. Cas. 344. | (No. 1), <i>infra</i> . |
| (2) 3 De G. M. & G. 430. | (5) Reversed by the Court of Appeal. |
| (3) 19 Ves. 345. | See <i>In re Trustees of Owen's Estate</i> |
| (4) Affirmed by the Court of Appeal. | (No. 2), <i>infra</i> . |
| See <i>In re Trustee of Owen's Estate</i> | |

Where an incumbrancer having carriage of the sale of a solvent estate, over which there was no receiver, had entered into negotiations with tenants for the sale of their holdings, and the agreements were almost completed, the Court declined to transfer the carriage to trustees for sale, with a view of their applying, under sub-sect. (3), to put the 40th section into operation, the application for transfer being opposed by parties beneficially interested in the estate.

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JOHN MURPHY'S ESTATE.

This was an application by the petitioner having carriage to resettle the rental in order to carry out agreements for sales to tenants of their holdings which had been completed previously to the passing of the Land Law (Ireland) Act, 1896. The lands consisted of ordinary agricultural and pastoral holdings, or holdings partaking of both characters. When the application was first made to the Court, the Judge expressed a desire to have the question argued whether the sales could be carried out otherwise than upon a request made by him under section 40. All parties were anxious that the existing agreements should if possible be carried out without having recourse to the procedure under the section.

An application was at the same time made by a tenant named Walker, who held under a Court letting made for seven years pending the matter, that the section should be put in force with respect to his holding. This was resisted by the parties interested in the estate.

R. E. Meredith, Q.C., and John W. Richards, for the petitioner ; Matheson, Q.C., and T. M. Healy, for the tenants ; and Hyacinth C. Plunkett, for an incumbrancer :—

Clause (a) of sub-sect. 1 could never have been intended to apply where everything to effect a sale to tenants had been completed before the Act passed. The words "at the request of the Land Judge" give the key to the whole clause. "Request" implies a previous consideration of the circumstances of the case, and involves some discretion on the part of the Land Judge. He has the option of making the request or abstaining from doing so ; although when he does make the request the clause thereby becomes mandatory on the Land Commission. The consequences

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of holding otherwise would be appalling. Take the case where incumbrancers have gone to enormous expense in obtaining agreements with tenants. Is that all to be sacrificed, and further delay interposed? The words "shall cause the estate to be inspected" points to futurity. Why should an estate already inspected be inspected again? The Court can impose conditions such as that other tenants should agree to purchase within a limited time (clause *b*), and the Legislature may be supposed to have entrusted the Court with a discretion whether it would put the section in force on an estate where agreements had already been concluded. The old procedure is not repealed. The object of the Act was not to prevent landlords and tenants entering into contracts for purchase at a fair price, but to give every tenant a right of pre-emption. Here pre-emption has been offered to the tenants, and accepted. By sect. 50, sub-sect. 1, Part I. of the Act, with certain express exemptions, is made applicable to pending cases. By sub-sect. 5, Part III., is not without consent to apply to pending proceedings. The inference is that the application of the rest of the Act to pending matters is left discretionary with the Court. Parts II., III., and V. of the Act are to be construed as one with the Land Purchase Acts (sub-sect. 4). Here are proceedings under those Acts on the verge of completion.

MURPHY'S ESTATE (WALKER'S CASE).

Walker was a tenant under the Court of part of the estate called Richfield.

Matheson, Q.C., and *Healy*, for Walker :—

Before the Act of 1896 the Land Commission were in the habit of selling to tenants holding under Court leases: *Lawrence's Estate* (1). By sect. 40, sub-sect. 1 (*b*), the offer is to be made "to the person appearing to be in occupation as tenant of each holding on the estate." In clause (*c*) the same words, "appearing to be in occupation as tenants," are used. Then sub-sect. (2) provides that "any person in occupation, and paying rent for a parcel of land (including the owner of an estate in occupation of a

(1) [1896] 2 I. R. 347, see p. 350.

mansion-house or demesne forming part of the estate) held under a letting by the Land Judge or Receiver Judge, may agree to purchase such parcel of land. The meaning of this, coupled with clause (c), is that he shall be deemed to have agreed to purchase his holding within the meaning of the Land Purchase Acts. The Land Commission have always been in the habit of selling to *bond fide* tenants, even though the tenancy was created for the very purpose of purchase. No machinery is provided for carrying out an agreement for purchase between a Court tenant and the Land Judge. The purpose of sub-sect. (2) was to get rid of some doubts which were expressed by the Court of Appeal in *Lawrence's Estate* (1).

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Independently of sub-section (2), Court tenants are entitled to pre-emption. "Appearing to be in occupation as tenant" is sufficient to attract the machinery of the law. The history of the legislation on sales to tenants is important. In the Act of 1870 "occupying" is used in section 46 as a qualification of "tenants" to whom facilities for purchase were to be offered, while in sections 44 and 45 of that Act the word "tenant" only is used.

It was never suggested until hinted at by some members of the Court of Appeal in *Lawrence's Estate* (1) that advances could not be made by the Land Commission to tenants holding under Court lettings. The latest statutory provision as to sales prior to the present Act is the 13th section of the Purchase Act, 1891, providing for sales to evicted tenants. This is re-enacted, with an extended limit of time, by section 46 of the present Act. Sub-sect. (2) of section 40 is construable and intelligible when taken in connection with sub-section (3). If, as in *Granard's Estate* (2), the landlord is tenant under the Court of portions of his estate, other than the demesne and mansion-house, he is entitled to purchase and obtain advances. The object of deeming the Land Judge landlord is because the actual landlord is to be treated as tenant. The reason why tenants under Court lettings were excluded from the fair rent provisions of the land code was not because they were not tenants, but because the lettings were held to be lettings for temporary convenience: *Callan v. Dowdall* (3); *Jellis v.*

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Swift (1). The ground of their exclusion as put by Mr. Commissioner (afterwards Mr. Justice) Litton was, that the Court had no power to make a letting which would injure the remainderman. But here, *ex hypothesi*, there is to be no regard for a remainderman, because there can be only Court lettings where there is a receiver, and in such cases the sale is to be made without the consent of the owner. An apparent tenancy is all that is required. If any equities or grafts existed, these were not to prevent a sale, but were to be preserved in the subsequent registration of title.

R. E. Meredith, Q.C., and J. W. Richards, contra :—

The Land Commission are only prohibited from making advances where the subject-matter of the tenancy under the Court is the demesne or the mansion-house. But there is in every case a condition precedent—the intending purchaser must “agree to purchase.” Apart from sub-section (2), Walker would not be a tenant at all except by estoppel. Sub-section (1) purposely omitted persons in the position of Walker and Lawrence. But it was not intended to leave such persons out altogether. If they made a voluntary agreement with the Land Judge or Receiver Judge (as the case may be) with the approval of the parties interested in the estate, the purchase can be carried through by an advance.

ESTATE OF TRUSTEES OF R. OWEN.

In this case several tenants held under lettings from the Court, and the question was raised as to the application of section 40 to such tenants (2).

C. R. W. Brady (3), for the owners and petitioners having carriage; and *Dunbar P. Barton, Q.C.*, for incumbrancers:—

We contend that tenants holding under Court leases may

(1) MacDev. L. C. 319.

(2) Several details connected with this case which are unnecessary for this report will be found in the report of the appeal *In re Trustees of Owen's Estate* (No. 1), *infra*.

(3) As to the question whether the 40th section was mandatory, *Mr. Brady* stated that he would not argue the point, having regard to his Lordship's decision in *In re Grogan's Estate* ([1896] 1 I. R. 614).

enter into voluntary agreements under sub-sect. (2), of sect. 40, but that they cannot purchase otherwise. Court lettings were always made at moderate rents. Under the Act of 1887, sect. 14, sub-sect. (3), any person in occupation of and paying rent for a holding which is held under a contract of tenancy might enter into an agreement for purchase. The Act of 1885, sect. 4, speaks of the sale of holdings by the Land Judge to the tenants thereof. The Act of 1896, sect. 35, sub-sect. (1), speaks of agreements for purchase after the Act, but applies manifestly to cases only of tenancies under a landlord. Thus at the date of the Act of 1896 the Land Judge could sell to a tenant, but not to a tenant holding under the Court, and no sale could be made by mortgagees. Sub-sect. (2) provides for tenants holding under the Court, and sect. 42 provides for the cases of mortgagees in possession with power of sale, who are thereby deemed to be landlords for the purposes of the Land Purchase Acts. The word "parcel" in sub-sect. (2) is borrowed from the Act of 1881, sect. 57. The same term was used in sect. 7 of the Purchase Act, 1885, with reference to sales by the Land Commission to others than tenants. Hence "parcel of lands" in sub-sect. (2) denotes something different from "holding," which implies a landlord. Upon an agreement being entered into by the Court tenant, the Land Judge becomes the landlord, and the "parcel" is converted into a holding. But sub-sect. (2) stands separate from sub-sect. (1), and sub-sect. (3). The former is prefaced by the words, "the following provisions shall have effect," and the latter by the words, "the foregoing provisions may be applied." But there is nothing to apply these provisions to cases under sub-sect. (2). Consider the absurdities which would follow from holding Court tenants within the compulsory provisions of these sections. Take the case of a tenant under the Court holding the greater portion of a demesne, the owner not holding as tenant under the Court but left in possession of a small portion of land and the mansion-house. Is the Court bound to sell the saleable part of the demesne away from the mansion-house? Or take the case of an insolvent owner being tenant under the Court of a large farm, is he to have a right of pre-emption out of public funds? [Ross, J., What force do you give to "appearing to be in occupation of a holding" ?]

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A Court tenant does not appear to be in occupation of a holding. He may appear to be in occupation of a parcel of land paying rent to an officer of the Court. "Parcel of land" has acquired a separate connotation in this code. [Ross, J., With respect to the words "may agree," in sub-sect. (2), are you not referred back to sub-sect. (1), (c)?] "Shall be deemed to have agreed," in clause (c), implies that no agreement has been lodged, that the offer of pre-emption has been accepted. "May agree," in sub-sect. (2), means an actual agreement lodged as under the old procedure.

Cherry, Q.C., for some of the tenants.

As regards the mandatory character of the 40th sect., sub-sect. (a) is logically subsequent to sub-sect. (b), which is admittedly mandatory; (a) provides the machinery by which (b) is to be carried into effect. Where discretionary powers are given the phraseology of the Land Purchase Acts is quite different: Act of 1885, section 5; Act of 1887, sections 15, 16.

Under sub-sect. (1) all tenants, including Court tenants, are given the right of pre-emption. Demesnes and townparks always came within the Land Purchase Acts. Tenants under Court lettings were so far considered to fill the actual character of tenants that they were entitled to emblements: *Creed v. Creed* (1); *Hyde v. Roche* (2); and though it was held in the last cited case that they were not entitled to remain in occupation in lieu of emblements under 14 & 15 Vict., c. 25, that was because the 1st section of that statute did not contain words which are to be found in section 34 of the Landlord and Tenant Act, 1860. If sub-section (2) is an independent provision the concluding words of sub-section (3) are entirely unnecessary and unmeaning.

T. M. Healy, for other tenants:—

If sub-sect. (2) is an independent clause, clause (g) of sub-sect. (1) is not extended to it, nor apparently to sub-sect. (3). But in cases of solvent estates the landlord may, under sub-sect. (3), put the provisions of sub-sect. (1), so far as they are applicable, in force. As to the argument founded on the use of the term "parcel of

(1) 3 Ir. Eq. R. 207.

(2) 5 Ir. C. L. R. 195.

land," in the Act of 1887, sect. 9, "holding" and "parcel of land" are used interchangeably. It could never have been the intention of the Legislature to exclude the large body of tenants holding under the Court from the benefits of pre-emption. After a receiver was appointed no other kind of tenancies could be called into existence.

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ESTATE OF TRUSTEES OF A. O'REILLY.

This was also an application by the tenants for a re-settlement of the rental, in order to carry out sales pursuant to agreements concluded prior to the passing of the Act.

J. H. Shaw, for the party having carriage.

T. M. Healy, for the tenants.

ESTATE OF TRUSTEES OF MARCUS LYNCH.

This was a solvent estate. No receiver was appointed, and the petitioner's charge was paid off. Negotiations for sale had been entered into by the petitioner's solicitor with the tenants. The owners who were trustees for sale applied for transfer of the carriage with the view of putting sect. 40 into operation.

A. F. R. Stritch, for the owners.

Dunbar P. Barton, Q.C., for incumbrancers, supported the application.

Ross, J. :—

A number of cases have lately been before the Court in which I have been obliged to consider the effect of sect. 40 of the Land Act of 1896. Dec. 23.

At the request of counsel I have reserved my decisions until I had an opportunity of hearing the arguments in all these cases.

The first question raised is whether the Land Judge has any discretion in the matter of putting the section into operation. On this point I was obliged to form an opinion on the first occasion,

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1896. were held.

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My opinion at that time was that the section was mandatory upon the Land Judge. I was of opinion that the tenant had acquired an interest in the *sale*—not in the estate—that I could not lawfully permit a sale to be made to an outside purchaser, without first making to the occupying tenants an offer to sell to them the fee-simple at such price as I might consider just, “having regard to the interest of all persons interested in the estate.” I was therefore obliged to adjourn all such sales. This was the only course open to me, otherwise the tenants might have suffered an injustice. If I had allowed the sales to proceed, and had sold to outsiders—the conveyance from this Court would have ended the matter, and the tenant’s right would have been destroyed. I intimated that if I had had any discretion, I would have exercised it by allowing the sales to proceed—having regard to the expense incurred in advertisements. This course I was obliged to take without having the question argued.

In this state of circumstances I have allowed the matter to be argued, notwithstanding my decision. Having heard all the arguments on both sides, and having kept an open mind to the last, I am of opinion that my former decision was right—that the section is mandatory—that until an offer has been made to the occupying tenants of agricultural or pastoral land I have no power to sell to the outside purchaser. The object of the section is evidently to clear this Court of estates by sale—where the owner is cut off from the collection of rent by the appointment of a receiver, or when the estate is hopelessly insolvent. In order to effectuate this object certain preliminary steps must be taken for the purpose of obtaining information. When the information has been obtained in the prescribed way it is not denied that the section is mandatory upon both Land Judge and Land Commission. It has been urged that clause (a) which comes first in order contains the words, “The Land Commission shall, at the request of the Land Judge, cause the estate to be inspected”; that the expression “at the request” implies a discretion on the part of the Land Judge to grant it or to withhold it. This would be to confer upon this Court an extraordinary power. There is nothing

in the Act to guide the Court in the exercise of its discretion. The Judge could paralyze a section that was evidently intended to have far reaching results. The Court of Appeal could not very effectively interfere in a purely discretionary matter, where no principles are laid down in the statute to guide the Judge's discretion. I cannot think that this was ever intended, or that the words used express any such intention. The plain purpose of the section is that if the occupying tenant is willing to give as much as a *bona fide* outside purchaser, he is to *have the preference*.

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The tenant is in a position of great advantage. The offers with which he competes must of course be *bona fide* offers enforceable by attachment if accepted, and he has the privilege of having public money advanced to him to enable him to purchase while the outside purchaser has no such aid. Clause (a) I hold to be merely ancillary to this object, and is intended to enable the Judge to obtain reliable information on which he can safely act.

The next question arises in cases where agreements for the purchase of an estate have been lodged with the Land Commission and where the estates have been inspected.

I am pressed by incumbrancers, owner, and tenants in these cases to recast the rentals so as to allow the purchases to be completed under the 5th section of the Act of 1885.

It has been suggested, on the other hand, that all power to do this is gone, that although everything has been effected by the agreement of the parties that the section aims at effecting, I must treat these agreements as null, put the parties to the loss of the expenses of negotiation, set in motion the machinery of the 40th section, and when the turn of this estate comes—do over again what has been substantially done already. Where there is any doubt about the construction of a statute I think it wise to strain in the direction of common sense. I hold that, where the estate has been already inspected and the price arrived at in another way, namely, by agreement between the incumbrancers and owners on the one hand, and the tenant on the other, and where the Land Commission are ready to advance the purchase-money, the case does not come within section 40. The object aimed at in the section has been attained in another and a simpler way. The machinery by which sales to tenants have been usually effected has been left

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untouched by the Act. The Land Judge has still the power to sell direct to the tenant making use of the public moneys under section 4 of the Act of 1885. The Land Commission retain the power of purchasing from the Land Judge for the purpose of re-sale to the tenants under section 5. It is true that the reason for proceeding under that section have to a great extent been removed. Where in this Court there was not an estate in fee to sell, the only practicable procedure was for the Land Commission to purchase from this Court and re-sell to the tenants; first, because the Land Judge had not the same power of redeeming title, quit rent, and such like incumbrances as the Land Commission; and secondly, the Land Judge was obliged to enter upon an expensive and tedious inquiry as to easements, rights, and appurtenances which was not obligatory on the Land Commission. All this has been changed by the new Act. The Land Judge has conferred on him the additional power, and he has been freed from the burdensome obligation. There is no obstacle in the way of the completion of these transactions under section 5.

In the cases now before me I shall have the rentals recast, in order to enable the sales to be carried out by the Land Commission. I desire to point out that the Court of the Land Commission are free from the responsibility of deciding whether the cases come within or not within the scope of the section. If I hold a case comes within its scope, they must act on my request. If I hold a case is not within its scope, as I do in these cases, they will of course proceed to bring the sale to a conclusion by virtue of the powers conferred on them by the Land Purchase Acts. My present decision only affects cases where the estates have been inspected and the parties have agreed. I simply decide that in these cases the sales may be concluded by applying the old machinery, and that I am not obliged to undo all that has been done in order to put the new machinery of the 40th section into operation.

I wish to add that I am not to be taken as deciding anything as to future sales by agreement between the parties.

The next question I have to decide is as to the rights and position of persons in occupation of land under Court lettings. I

has been contended on their behalf that under the 40th section they are in exactly the same position as the ordinary tenant, that I am obliged to include the lands held by them in my request, and that they are entitled to have the offer made to them to sell the fee-simple. It is pressed on their behalf that they must be included in the class mentioned in sub-sect. (b) of section 40, namely, "persons appearing to be in occupation as tenants of each holding." This form of expression was evidently intended, as in the case of the similar expression used in the Franchise Acts, to relieve the Court from the necessity of inquiring into the tenant's title. If he appears to be in occupation as tenant the Court, without deciding anything as to his title to the tenancy, can treat him for the purposes of the section as representing the tenancy, and can vest the fee-simple in him, though he may have no beneficial interest whatever in the lands, and the new interest may be merely a graft upon the previous interest belonging beneficially to somebody else.

It has, however, been urged that, whatever the intention, the words are so wide as to cover the case of all persons holding under Court lettings other than the owner of the estate. On the other hand, it has been contended that they are not in occupation as tenants of holdings at all; that they are merely in occupation of a parcel of land, not the same thing as a holding. Furthermore, it may be pointed out that, under the definition section of the Act of 1881, a tenant means a person occupying land under a contract of tenancy. But what is a contract of tenancy as defined by that Act? "It means a letting, or agreement for the letting, of land for a term of years, or for lives, or for lives and years, or from year to year." I should hesitate very much before I should decide that a temporary letting pending the matter, immediately extinguishable on the contingency of the sale of the estate, could come under this definition. Whatever difficulty might exist if sub-section (1) stood alone is, to my mind, removed by the consideration of sub-section (2), and the genesis of that sub-section. Where did it come from? It came from the decision of the Court of Appeal in the case of *Lawrence's Estate* (1), decided in December, 1895.

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(1) [1896] 2 Ir. R. 347.

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There a tenant for life of an insolvent estate, who had obtained from the Land Judge a lease for seven years pending the matter, sent in a proposal to purchase the leased premises from the Land Purchase Commission, who refused to make the advance. From this ruling an appeal was taken, and the appeal was unanimously dismissed; the Lord Chancellor and Lord Justice Barry holding that they ought not to interfere with the Land Purchase Commissioners in the exercise of their discretion. But the Lord Chief Justice and Lord Justice FitzGibbon rested their decision on the express ground that the applicant was not a tenant at all within the meaning of the statute; that there was no jurisdiction in the Land Commissioners to make him any advance. In the course of the argument a question was addressed by the Lord Chancellor to the Land Commissioners as to whether it was their practice to advance money to persons, other than the owner, who were tenants to the Court pending the matter; and the Land Commission replied in the affirmative. Thereupon, the Lord Chief Justice and Lord Justice FitzGibbon, without expressing any decided opinion, threw some doubt on the legality of this practice. In that state of things the Legislature, in section 40, inserted sub-section (2), dealing with the entire class, not merely owners holding under a Court letting, but with all persons holding under Court lettings. They are described "as persons in occupation of, and paying rent for, a parcel of land under a letting by the Land Judge or Receiver Judge." The section goes on to state that such persons *may agree* to purchase such parcel of land; and, to enable this agreement to be made and carried into effect, the parcel of land may be deemed to be a holding, such person a tenant, and the Land Judge or Receiver Judge a landlord.

The section is an enabling section, conferring, unmistakably, a great privilege upon a class of persons whose rights before were uncertain; namely, to get an advance of the purchase-money from the Land Purchase Commissioners in case they agreed with the Land Judge for the purchase of the lands in their occupation.

If it had been intended that they were to be dealt with in the same way as other tenants, what would have been easier than to enact that they were to be deemed to be persons appearing to be in occupation as tenants of their holdings within the meaning of

sub-section (1)? I hold the sub-section to be an independent sub-section dealing with a class of persons altogether distinct from those affected by sub-section (1) of section 40.

Why does it appear as a sub-section of section 40, and not as an independent section? Because, in my opinion, it is intended to be auxiliary to the objects intended to be attained by sub-section (1).

The object is to effect a sale, to get the estate out of Court, and the receiver removed. This section enables the Court to dispose of the rest of the estate by making use of the public money. Under clause (*d*) of sub-section (1) the Land Judge, in case the tenants of holdings on the estate to the extent of not less than three-fourths in number and value, accept the offer, can coerce the remaining fourth to accept it. Startling consequences would ensue if the Court tenant's consent to purchase can be used to coerce the other tenants, or if *their* consent can be used to coerce him. I, therefore, decide that my request shall not be extended to the case of persons holding under Court lettings; such persons being at liberty to purchase their holdings by agreement with this Court.

The next case with which I have to deal is a case where no receiver has been appointed, and where the estate is not insolvent. Such an estate I have on a former occasion decided to be outside the scope of the 40th section. The present position of affairs is this, the solicitor having carriage has been engaged in negotiating agreements for sale with the tenants. These agreements are on the point of completion. The charge of the party having carriage has lately been paid off. Under these circumstances I am asked to transfer the carriage to the owners, who are trustees for sale, in order that they may apply under sub-section (3) of section 40 to have the estate sold under that section. I think it much more advantageous to allow the negotiations to be proceeded with, and the sale to the tenants to be completed without putting into operation sect. 40 at all.

I, therefore, refuse to transfer the carriage to the applicants, particularly as the beneficiaries under the trust for sale are strongly opposed to the application.

Applying the principles I have already laid down, in

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Owen's Estate, the sale of the agricultural lots will be adjourned *sine die*, or if I am asked so to do, I shall issue a request to the Land Commission under section 40. As regards the lots held under temporary lettings, the solicitor having carriage is at liberty to negotiate with the tenants for the sale to them by agreement, or they may be put up for auction. In *Murphy's Estate* I shall re-settle the rental as requested, and permit the sale to proceed through the Land Commission.

In *O'Reilly's Estate* I shall re-settle the rental as required, and permit the sale to be proceeded with in the Irish Land Commission.

Solicitors: *Reeves and Sons; Baker and Ringwood; Buggy; Menton; Horan and Shortt; Huggard.*

W. G.

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IN THE MATTER OF THE ESTATE OF THE TRUSTEES OF
R. OWEN (No. 1) (1).

Dec. 14-16.

1897.
Jan. 15.

Estate in Land Judge's Court over which receiver had been appointed—Absolute order for sale made—No agreements for sale with tenants—Land Law (Ireland) Act, 1896, sect. 40.

1. In every case where the conditions mentioned in sect. 40, sub-sect. 1, of the Land Law (Ireland), 1896, exist, it is *prima facie* mandatory on the Land Judge to request the Land Commission to make the inspection and report mentioned in sub-clause (a), and afterwards make to the tenants the offer mentioned in sub-clause (b).

2. But an estate may be so specially circumstanced, *e.g.* if a sale has become, or, within a reasonable time, may become unnecessary, that it would be reasonable that the Land Judge should put a stay on the making of the request, or forbear from making it, and in such special cases the Land Judge retains a judicial discretion.

So held by the Court of Appeal (Porter, M.R., and FitzGibbon, L.J., *dissentientibus*).

3. Before sending the request under sub-clause (a) the Land Judge should give an opportunity for its being considered whether the conditions mentioned

(1) Before LORD ASHBOURNE, C., SIR PETER O'BRIEN, L.C.J., PORTER, M.R., PALLES, C.B., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

in sub-clause (a) exist, or whether there are any special circumstances, sufficient to induce him to put a stay on the making of the request, or forbear from making it (1).

Per Fitz Gibbon, L.J. : The Land Judge, in sitting under the Act of 1896, sect. 40, has the same judicial discretion, and ought to exercise it in the same manner, as under the Landed Estates Court Act, 1858, sect. 55.

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THE petition for sale in this matter was presented on the 11th August, 1888, and the conditional order for sale was made absolute on the 22nd October, 1888. An action had been brought in the Chancery Division of *Poe v. Shortt* to administer the assets of Robert Owen, in the Court of the Master of the Rolls, and by order of Porter, M.R., dated the 25th March, 1884, a receiver was appointed over the lands, pending the hearing of the administration suit. On the 17th June, 1887, an order for sale was made by Porter, M.R., and that was carried out by proceedings in the Landed Estates Court. The title was approved, and the rental was settled in June, 1896. The advertisements were duly published, and the matter came on for sale on the 30th October, 1896. There was no agreement with the tenants to sell to them. The property consisted of sixteen lots, of which five lots were in the hands of agricultural or pastoral tenants, seven lots were in the hands of Court tenants, three were in the hands of the owners, and there was one annuity. Lot No. 16, the annuity, was sold, and Ross, J., gave leave to advertise for private offers for lots 14 and 15 and 8, being the lands in the owners' hands, but the learned judge adjourned the sale of lots 1 to 7 and 9 to 13 generally, and directed the matter to be entered in the list for argument for the 13th November upon the questions—1, as to whether sect. 40 was mandatory on the Land Judge, and that he had no discretion in withholding his "request"? and, 2, whether tenants under Court lettings were within sect. 40? (2)

Matheson, Q.C., Meredith, Q.C., and C. R. W. Brady, for the owners:—

The Land Purchase Act of 1885 provided by sect. 2, as applied

(1) A form has been since settled for the purpose of carrying out paragraph 3.

(2) See the judgment of the Court below, *supra*, p. 193.

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by s. 4, for the sale to the tenants of their holdings, and provided that the tenants might purchase either from the Land Commission or the Land Judge. That first brought in the Land Commission into those sales, and put the Land Judge in the position of a landlord selling to a tenant. But there must first be an accepted proposal to sell, and in order to sell to the tenants the Land Judge would have to go through the proceeding of re-casting the rental, although the Land Commission might afterwards refuse to make the advance because the estate was not sufficient security. A sale carried out in that manner was subject to the consent of the Land Commission. The only other method of carrying out a sale under the Land Purchase Act was for the Land Commission to buy the estate under sect. 5 from the Land Judge. But in neither case could the Land Judge start the matter of his own mere motion.

In order to carry out sales to the tenants, it was necessary to put the Land Commission, so far as regards a sale in the Land Judge's Court, under the control of the Land Judge. This section was passed to meet that, and the effect of the section was to put the Land Commission under the control of the Land Judge as to these sales. There are no words which expressly make the section mandatory. The words "at the request" do not imply any mandate on the person who is to make the request; it is in his discretion to do so. The words "shall have effect" mean shall be put in force. The Court must take into consideration the person, the subject-matter, the context, and the circumstances under which the statute was passed. The Land Judge was never controlled by any of these Land Purchase Acts, but he was governed by the Landed Estates Court Act, and this statute does not alter his position. Section 55 of that Act is still unrepealed, under which the Judge always had a discretion as to whether he would sell or not, and "the request" was made necessary to preserve the powers of the Land Judge under this section.

The report must be considered by the Land Judge, and discussed by the parties. Sub-sect. (b) is ancillary to (a). This is not a pre-emption section. To construe this section as mandatory would lead to startling results; it would mean that once the request is given the report must follow, and the rest of the section

is mandatory. Moreover, the fee-simple must be offered for sale ; whether the Court is selling a tenancy from year to year, or a lease for ninety-nine years, the Land Commission must buy up the fee-simple out of the purchase-money under sect. 31, and also the mines and minerals. The mines and minerals are just as much the fee as the soil. Is the expense of that to be added to the price at which the estate is to be offered to the tenants? What the Judge offers to the tenants is the fee, though what he offers to the outsiders is the estate before the Court. The mandatory construction must mean that no matter what offer an outsider makes, it cannot be listened to, the tenants must get the offer first. If the matter is discretionary, the incumbrancers could ask the Land Judge not to issue the request, as they would be ruined by the expense. In the administration of an estate in the Chancery Division the property of simple contract creditors and the interests of legatees and devisees might be destroyed. There is no injustice if the power is discretionary. As to "drifting estates" in the Land Judge's Court, it is the duty of the Land Judge to put them in the list to explain delay, and he could either transfer the carriage or dismiss the petition. If the section is mandatory the tenants cannot purchase by agreement, it would have to go to the Land Commission on "request."

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Cherry, Q.C., and T. M. Healy, for the tenants :—

In construing a statute regard must be had to the entire subject-matter, and to take a few words by themselves is against the canons of construction. Even enabling words in a statute are construed as compulsory, when the object of the power is to effectuate legal rights: *Sweeny v. Lord Ashtown* (1); *Julius v. Bishop of Oxford* (2); *Reg. v. Tithe Commissioners of England* (3).

The section states two conditions, and when these exist the jurisdiction must be put in force. Sub-clause (a) of sub-section 1 is ancillary to (b). We do not contend that if sub-clause (a) stood alone, it would be mandatory, or that the words "at the request of the Land Judge" are in themselves mandatory. "Request" implies an option, but it is in the person who is

Appeal. requested, and not on the part of the person who makes the request. These words are *per se* neutral, and consistent with either construction; but by reason of sub-clause (b) being mandatory in character, they must also be mandatory. In sub-clause (d) an option is given, so that when the Legislature wanted to give an option apt words are used. If the section is not mandatory it had no object at all, for the Land Judge already had power to sell to tenants under sect. 4 of the Land Purchase Act, 1885. The argument *ab inconvenienti* cannot control the plain and clear terms of a statute.

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The tendency of the Purchase Acts was to enable tenants to purchase their holdings with State money, notwithstanding the landlords. This section gives the finishing touch, and gives the tenants these rights, notwithstanding the incumbrancers.

The prior decisions on the Purchase Acts show what the policy of the Legislature was. In *Harenc's Estate* (1) (decided in 1878), the tenants offered a larger sum than any other bidder, and their offer was rejected. In *Young's Estate* (2), decided in 1892, the tenants' offer was rejected, although their offer was as large as that of the outside purchaser; the only difference was that the tenants' offer was in land stock, and that of the outside purchaser in cash. The Legislature therefore intended to pass a mandatory measure, compelling the Court to sell to the tenants, provided of course the full price was bid. There is no hardship, because it is notorious that there are no sales in the Land Judge's Court now, except to the tenants with the help of public money.

By the 23rd sect. the Land Commission and the Land Judge were fused together, and the "request" in sect. 40 is to be construed on the basis that the Land Commission and the Land Judge are one and the same person. Moreover by the Irish Church Act of 1870, sect. 26, the imperative right was given to the tenants to purchase, to the exclusion of everyone.

By the Act of 1870 there was advanced to the tenants two-thirds of the purchase-money at £5 per cent., repayable in thirty-

(1) 1 L. R. Ir. 428, 470.

ported on another point, 26 Ir. L. T.

(2) Unreported. Court of Appeal, Rep. 27.
16th May, 1892. See the case re-

five years. By the Act of 1881 there was advanced to the tenants three-fourths of the purchase-money. By the Act of 1885 the whole of the purchase-money was advanced at £4 per cent., and the time of repayment was extended from thirty-five to forty-nine years; but there was only £5,000,000 advanced under that Act, and one-fifth of the purchase-money was retained as a guarantee deposit. By the Act of 1888 the £5,000,000 was increased to £10,000,000, and by the Act of 1891 £30,000,000 was advanced. Finally, by the Act of 1896 the guarantee deposit was abolished. The entire course of the legislation has been in favour of extending the facilities of purchasing.

In every case the Judge is to assume that the section applies, and the *onus* lies upon those who object to a sale, to make out a case to stop him. Once a Receiver is appointed the bolt is shot, unless the owner can get the Receiver discharged, or make out a case to postpone the sale. The Land Judge is the *dominus* of the sale as to price, and can decline to sell unless a fair price is offered.

LORD ASHBOURNE, C. :—

This is an appeal from Mr. Justice Ross, and raises an important question on the construction of section 40 of the Land Act of 1896.

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Several lots on this estate (held in fee-simple, and therefore free from some questions which were suggested during the argument) were ready for sale, all the advertisements having been made, and the learned Judge held that he was bound to adjourn the sale, in order that the requisite steps might be taken by sending his "request" to the Land Commission to make an offer of sale to the occupying tenants.

He held that he had no option or discretion, and that the section was mandatory on him; that the preferring of the "request" under sub-section (a) was to supply one of the important elements that was needed to enable a price to be paid under sub-section (b); and that in fact (a) was auxiliary to (b), which is manifestly mandatory. In substance I think that Mr. Justice Ross was right, and that in the case before him he was bound to make the order he pronounced. I cannot think that the section ever

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contemplated giving the Judge a discretion, under which he might do nothing, and thus leave possibly the section a dead letter.

It was the intention, I think, of the section to graft, on the existing procedure towards a sale, this new method, by which a price should be fixed for a holding, and then that it should be offered at that price to the occupying tenant.

In the fixing of the price every care is taken under subsection (b), that all parties shall be heard and every interest considered. To assist this fixing the Judge should prefer his request for a report to the Irish Land Commission. The section provides for the fixing of the price, and for the offer to the tenants, but if the offer is refused, the matter is left at large.

The section only applies to holdings that come within the Land Purchase Acts, and which also are agricultural or pastoral. In this case the learned Judge was satisfied from the course of the procedure before him on these two points, but if he was not, I think he should have ascertained them before sending forward his request.

It was contended before us that section 55 of the Landed Estates Act, 1858, and his powers as a Judge of the Chancery Division of the High Court, enabled the Judge to exercise a discretion as to making the request. It is quite true that section 55 is not repealed, and must be read with section 40 of the Act of 1896; it is also true that the Judge has all the jurisdiction of a Judge of the Chancery Division of the High Court, but this in face of the clear words of section 40, does not take away the judicial obligation, which is cast upon him by this last-mentioned section. He has important powers under section 55, and as a Judge of the High Court, which no doubt in proper cases, and on special facts, he could and would use.

But then it is urged, if the preferring of the request is practically mandatory, it may be behind the backs of all the parties most interested, and made in ignorance of important circumstances, which might seriously affect the exercise of his jurisdiction. I do not think that this difficulty is a necessity under the section. I think it would be of much advantage and convenience, if the Judge gave (say) ten days' notice, in the Court list or other-

wise, that he would, on a named day, consider whether the conditions, mentioned in the 40th section, applied to such estates, and would then hear any application founded upon special circumstances applicable to the estate in reference to the sending of the request to the Land Commission under the section. A rule, or regulation, or practice, could readily be adopted for this purpose.

This might be of great assistance to the Judge in giving him some additional and needed information as to how far the holdings came within the section, and would at the same time enable parties, who were so advised, to put forward any special equities that might affect the case.

On the whole I think that the order of Mr. Justice Ross was right and should be affirmed, and this appeal dismissed, the tenants' costs being paid out of the estate, and the owners' in the matter.

SIR PETER O'BRIEN, L.C.J. :—

I concur in the result which has been arrived at by the Lord Chancellor.

The plenary constitution of the Court, and the elaborateness of the argument which has been addressed to us, indicate the importance of the question we have to decide. That question is whether where an absolute order for the sale of an estate comprising holdings of an agricultural or pastoral, or of a partly agricultural and partly pastoral character, has been made under the Landed Estates Land Act of 1858, and either a receiver has been appointed over the estate, or the estate is insolvent, an offer to sell the fee-simple of their holdings to the tenants in occupation, must in the first instance be made to them? This question is most undoubtedly a very important one. Counsel, on behalf of the appellants, have more than once asserted that to answer it in the affirmative would be disastrous to landowners, whereas counsel for the respondents have insisted that an affirmative answer would be equally salutary to landowners and tenants. Whatever the result would be, the question, which is one of considerable difficulty, should be considered with great care. Having considered it with the most anxious care, I have arrived at the conclusion that the true construction and meaning of the Act of

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Parliament is that, in proceeding to a sale of an estate over which a receiver has been appointed, or which is insolvent, an offer to sell their holdings to the occupying tenants must, in the first instance, be made to them. The tenants must have the first option to purchase, or to decline to do so. Once a sale becomes necessary the Judge has no discretion in the matter—the statutory mandate is peremptory. The right, so to speak, of the first refusal is conferred upon the tenants, and a correlative obligation is imposed upon the Land Judge to make to them the first offer to sell to them the fee-simple of their holdings at a price fixed by him.

I have used the expression when a sale becomes necessary, and I have done so advisedly, because I do not think that under all circumstances the Land Judge is bound to sell, even though an absolute order for sale should have been made, and a receiver appointed, or the estate should be insolvent. He may, at any time, for good cause, cancel the absolute order for sale, and dismiss the petition. The *raison d'être* of the Land Court is to facilitate the sale and transfer of land in Ireland, and should it appear that the sale and transfer of land is not necessary, the Land Judge may, upon the lodgment of money to satisfy incumbrancers, or, though money is not lodged, pending arrangements for the lodgment of money, stay his hand, or generally he may stay his hand pending any *bona fide* arrangements to withdraw the estate from the Court, or upon the disclosure of the existence of any equity, which would warrant the rescission of the absolute order for sale. And further, he may, upon good grounds being shown, discharge the receiver, if one has been appointed, and, if the estate is not insolvent, withdraw it altogether from the operation of the section.

This, in my opinion, is one of the most important points of the many important points arising in this section. I asked Mr. Healy during the argument, whether once a receiver had been appointed the Judge should go on to a sale. He immediately answered—Yes; that the bolt had been shot; that the section must necessarily in that case be put in operation. He afterwards modified that answer. If Mr. Healy's original answer was right, very serious results might ensue. If every estate over which a receiver was appointed, and every insolvent estate, should be brought to the ham-

mer forthwith, the glut in the Land Court market might lead to consequences of the most drastic character. However, on this point, Mr. Healy said he thought he put his answer, that the bolt was shot once a receiver was appointed, too high. I think he did put it too high, because, in my opinion, it is competent for the Land Judge for good cause, certainly with the consent of the incumbrancers, to discharge the receiver, and once the receiver is discharged, if the estate be solvent the section cannot be applied, except with the consent of the owner as provided by the 3rd sub-section. The discharge of the receiver and the solvency of the estate would render the section inapplicable. This brings me to the scope and object of this much canvassed 40th section. It had, in my opinion, a three-fold object:—1st, To prevent the Land Court being a mere rent-collecting department; 2ndly, to compel the sale of insolvent estates; and 3rdly, to assure that the estates over which there was a receiver, or which were insolvent, were, in the first instance, offered to the tenants in occupation. The tenants were to be invited to buy. The initiative, as regards them, rested with the Court. They were, as I have already said, to have, so to speak, the right of the first refusal to buy, and there was to be a correlative obligation on the Land Judge to make to them in the first instance an offer to sell to them the fee-simple of their holdings at a price fixed by him.

I gather this to be the object of the statute from the language it uses and the state of things upon which it attached. It was urged at the Bar that, in very many instances, estates, in reference to which absolute orders for sale had been made, had so long remained unsold, that the Land Court, diverted from its paramount function, the sale and transfer of land, as indicated by the title of the statute which constituted it, had become a vast agency department for the management of estates, and the mere collection of rent. This unhappily is, to a certain, to a great, extent, but too true. It was also urged that the so-called Bright clauses of the Act of 1870 did not achieve the results that were expected from them, and that the key to the policy which dictated this 40th section is to be found in the Church Act, which, in the 5th clause of its 34th section, provided that the Commissioners should not sell to the public the fee-simple of any land, which was held under

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the Commissioners, until they had given notice to the lessee or tenant that they were willing to sell the fee-simple to him at a price to be named by them. Mr. Healy pressed this view with much force. But what does the statute we are interpreting say? That certain provisions distinguished by letters are to have effect, where an absolute order for sale has been made, if either of two conditions exist, namely, if a receiver has been appointed, or the estate is insolvent. What is the object of specifying the condition as to the appointment of a receiver? Plainly to bring back the Court to its true function, the sale and transfer of land, and to prevent its being subject to the imputation of being a mere rent-collecting department. This is one of the objects of the statute.

I think that in practically all cases the sale of insolvent, *i.e.* mere bankrupt, estates must be proceeded with. The contingency of the lodgment of money, or of the presence or accrual of those conditions which would enable the absolute order for sale to be cancelled and the petition dismissed, would, in these cases, be very remote. A sale must take place sooner or later, and, apparently, in the opinion of the Legislature, the sooner the better. If the owners of bankrupt estates have any connection with them, that connection must be only a source of vexation and unremunerative trouble; and the longer they remain unsold, the longer the Land Court continues a mere agency department, diverted from its true function—the sale and transfer of land. That Court was certainly never established for the purpose of maintaining a mere nominal ownership by the indefinite continuance of receivers under its control—mere nominal ownership which would be equally inconsistent with the true function of the Court and with the interests of the State. The State does not undertake, except in some very rare instances, to manage the property of individuals, but favours real ownership—the ownership, which stimulates the energies of individuals, which creates and fosters habits of industry, and conduces to the development and improvement of the subject-matter of property.

It has been said that the 40th section affects the manner of sale solely, but that the discretion of the Judge, up to the point of bringing the estate to a sale, is wholly unaffected by that section. I cannot accept this proposition. The words of the 40th section

are "that the following provisions," that is to say, the provisions as to sale, "shall have effect." These words "shall have effect," in my judgment, mean shall be put in operation by the Land Judge, and nothing, in my opinion, would justify the Judge in refusing to put them in operation except the removal of the conditions which form the basis upon which the legislation in the 40th section proceeds—namely, the existence of an absolute order for sale, the fact of a receiver being appointed, or the estate being insolvent, or unless there be some special reasons applicable to the estate in reference to the sending of the request to the Land Commission. In other words, except and unless there be some special reasons or circumstances which render it unnecessary to proceed with the sale of any particular estate—for once, as I have already said, a sale becomes necessary, the request must go to the Land Commission, and the section must be put in operation.

There is a matter which, I believe, causes some uneasiness—namely, that a combination may exist amongst the tenantry of a particular estate to intimidate outside competitions, and thus run down the price. If any such illegal combination should exist, the Land Judge may, in my opinion, at any stage of the proceeding, stay his hand, and allow the *status quo* to remain unaltered, because every Judge of a Court of Justice has a paramount inherent power to prevent his Court being made an instrument of illegality. One of the objects of the section is to procure and collate outside offers with a view to fixing the price, and if this cannot be done, if the price cannot be fairly fixed owing to the action of the tenants, the tenants will have themselves to blame. Of course, if the Land Judge thinks that in the absence of outside offers he can fairly fix the price, he must offer the holdings to the tenants at such figure as he thinks fit, and it will be for the tenants to say whether they accept the offer or not.

The Land Judge would, undoubtedly, also have power to postpone the time of sale. This he would have for the convenience of the Court, and of those interested in the estate proposed to be sold, and with a view to the proper conduct of the sale; but the Land Judge could not, in my opinion, vaguely await a more buoyant condition of the land market. True it is that the 55th section of the Act of 1858 is unrepealed, and that that section gave a very

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wide discretion to the Land Judge; but it must now be read in connection with the 40th section of the Act of 1896; and that section carries to my ear a very distinct complaint that there has been delay with reference to the sale of the class of estates with which it is conversant. Those who oppose a sale taking place of an estate, to which the Act is applicable, have the burden clearly and unmistakeably cast upon them of justifying their opposition.

It will be perceived that, in dealing with the question as to what power the Land Judge has to stay his hand and not proceed to a sale, I have in no way referred to the words "at the request of the Land Judge," which appear in clause (a) of the 40th section. The authority and power of the Land Judge to stay his hand is, in my opinion, to be found, not in clause (a) of the 40th section, but by reference to matters antecedent to and independent of that section. It is to be ascertained by determining whether, under the circumstances of any particular estate, there continues to exist any necessity for the exercise of the paramount function of the Land Court, viz. the sale and transfer of land; whether there are grounds for cancelling the absolute order for sale, and dismissing the petition; whether a receiver, if appointed, may be discharged; whether, if discharged, the estate over which he had been appointed is a solvent, or a mere bankrupt, estate; or, generally, whether special reasons and circumstances exist which render it unnecessary to proceed to a sale.

I have not experienced so much difficulty in refusing to accept the argument that the words "at the request of the Land Judge" imply a discretion on his part to put, or to decline to put, the section in operation, as I have in determining the true limits of his power antecedently and independently of these words to stay his hand, and not proceed to a sale.

In my opinion these much canvassed words do not imply any such discretion on the part of the Land Judge. They are found in that part of the Act, part III., which is intituled "Land Purchase," and, in the supplemental provisions of the statute, it is enacted that, amongst other parts, part III. shall be construed as one with the Land Purchase Acts, and together with these Acts may be cited as the Land Purchase Acts. The scope and object of those Acts were to make the occupying tenants owners in fee-simple of their

holdings. Still more we must bear in mind that the Bright Clauses of the Act of 1870, which merely directed facilities to be afforded to tenants to purchase, became practically a dead letter—while the provisions of the Church Act, which I have already quoted, and which were mandatory as to the offer to sell to the tenants, were conspicuously successful. The Land Act of 1870, so far as relates to this matter, was a conspicuous failure; the Church Act, so far as relates to the same matter, and especially from the vendor's point of view, was a conspicuous success. This is common knowledge. In giving judgment in the case of *Harenc's Estate* (1) Lord Chancellor Ball, after referring to s. 46 of the Land Act, 1870, said:—"The provisions of this section in favour of the tenants are expressly subordinated to 'the interests of the persons interested in the estates or the purchase money.' No right existing in the owner of an estate in the Court is taken away by it. The doctrine that when a sale is ordered, each tenant acquires a sort of proprietary interest entitling him, if he offers to pay a fair price, to insist upon a sale to him of his lot, has no foundation in the language of the section, and has been already condemned by the judgments in the case of *In re-Domville's Estate* (2) of Judge Flanagan and of the Appellate Court." And he went on to add:—"When the Legislature designed to give an absolute right of pre-emption to a tenant, as in the Irish Church Act, it knew how to express itself."

Now, in my opinion, the words in clause (b) of section 40, are equally as mandatory as in the 5th clause of the 34th section of the Church Act. The direction to offer the estate to the tenants is equally imperative in both statutes. Under the Church Act the tenants were to have a right of pre-emption at a price to be fixed by the Commissioners. Under this Act of 1896, the tenants are to have a right of pre-emption at a price to be fixed by the Land Judge. Under each Act the tenants were to be invited to buy. Indeed, it was admitted at the Bar that the language of clause (b) was mandatory, and that it was imperative on the Judge to make an offer to the tenants once the section was put in operation; but it was insisted, with considerable energy, that the words "at the request of the Land Judge" implied a discretion in him to put, or to decline to put, the section in operation. Well, in my opinion,

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(1) 1 L. R. Ir. 448.

(2) I. R. 11 Eq. 1, 13.

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more inept or inadequate words from which to imply so important a discretion could not be well conceived. The section is most elaborate in its provisions. The policy which dictated it found similar expression in the Church Act, which was most successful in its administration. I cannot gather from the use of this much controverted expression that the Legislature intended to risk the operation of the section by giving a discretion to the Land Judge to defeat it. The words, as I said, appear to me inept to establish the existence of a discretion, and the clause does not indicate any grounds upon which such a discretion is to be exercised. Besides, the Legislature, when it did confer by this statute a discretion, did so in the clearest language; for I find, in clause (*d*) of this same 40th section, these words, "if, having regard to the circumstances of the case, he thinks it expedient."

This is a plenary form of phraseology conferring a clear discretion. Is it reasonable to suppose that in the self-same section the Legislature intended that the existence of a discretion should be implied from the meagre and inept words in question? I cannot think so. No; in my opinion the central and dominant clause is clause (*b*). There is to be found the overshadowing purpose of the Legislature. That contains the mandate to the Judge to offer to sell to the tenants their holdings, and every other clause is either ancillary to the offer being made—indicative of the manner and conditions of the sale—or descriptive of the subject-matter which is to be sold. So resolved was the Legislature to carry out its policy, so eager was it that the tenants should purchase their holdings, that it gave power to the Land Judge, if tenants of holdings to the extent of three-fourths in number, and rateable value, had accepted his offer, to compel the rest to do so. Clause (*b*), as I have said, is the dominant clause, and in order to enable the Land Judge to discharge the obligation imposed upon him by that clause, he must set going the machinery that is to enable him to do so, and which is prescribed in clause (*a*). He must get the report of the Land Commission, and the Land Commission must supply it. The words "at the request of the Land Judge" are simply used to indicate to the Land Commission that the occasion has arisen when they must discharge the obligation imposed upon them.

As the obtaining of the report is the first step in the process which leads up to the offer to the tenants, it is placed first in the arrangement of the clauses. The object of the section was to give to the tenants in occupation, once the estate was to be sold, a right of pre-emption at the price fixed by the Land Judge, provided their holdings were of an agricultural or pastoral character, and that the estate, upon which their holdings were, was of the tenure prescribed by the Purchase Acts.

I accordingly think that Mr. Justice Ross was right in his interpretation of the section. I also think it is proper and expedient to give, with a view to ascertaining whether a sale must take place, and whether the estate is within the Act of Parliament, a notice to the effect referred to by the Lord Chancellor.

PORTER, M.R. : —

The great importance of this case, and the fact that the majority of my colleagues on the Bench found their opinion not solely or mainly upon the mere interpretation of the language used in this section, but chiefly upon their view of its relation to certain presumed general aims and objects, which are supposed to underlie it, must be my excuse for what I fear will be a judgment of considerable length. But for this latter consideration, I should have been content to express my view in a very few words.

The method of transfer provided in this section may in certain cases prove to be beneficial to the persons interested in the property transferred. I can understand that the difficulty of an agreement being arrived at between landlord and tenant may, in some cases, have prevented a purchase by the latter out of funds provided by the public; and that the intervention of the Judge, which, when it takes place, must be authoritative, may still be of service to both parties. This is, I think, a probable explanation of the section, though it leaves untouched the question whether the Judge should not have a discretion in applying it at all.

But, on the other hand, it is quite clear to my mind that the application of the section will in a vast number of cases work grievous, and I may say monstrous, injustice, if it be applied automatically, and without the exercise of judicial discretion. I shall proceed to show how this is.

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The Judge knows nothing about the estate himself so far as concerns its value, and, if he did, could not act upon his own knowledge of it. A clerk tells him that an absolute order for sale has been made and a receiver appointed in a particular estate. He *must* then offer it to the tenants, holding by holding, at a price. How is this price to be arrived at?—1. The Land Commission “shall” at his request cause the estate to be inspected, and send him a report to be made by two Commissioners respecting the estate, and the circumstances thereof, and the price at, and the conditions under, which the sale of the holdings to the tenants under the Land Purchase Acts can properly be made. 2. He is to give all parties “an opportunity of being heard.” 3. He is to consider the report and also “any offers that may be made for the purchase of the estate or any part thereof,” and any other matters that may be brought before him; and the “general circumstances of the estate.” When this has been done, 4, he shall make to the person appearing to be tenant in occupation of each holding an offer to sell to him the fee of his holding discharged from the arrears of rent then due from him, 5, “at such price and subject to such conditions . . . as the Judge may consider reasonable and just, having regard to the interest of all persons interested in the estate.” 6. The offer shall be communicated to the tenant (not by the Land Judge, but by the Land Commission); and if it is accepted, the tenant shall be “deemed” to have agreed to purchase the holding within the meaning of the Land Purchase Acts, and the sale shall be completed accordingly.

Now let us consider these several steps and see what they involve—1. The report of the Land Commission is of course only important in reference to the price at which a sale to the tenants can properly be made. How is that price to be ascertained by the Land Commission? By the report. That report is to be founded upon an inspection, which is of course an *ex parte* proceeding, and does not involve any hearing or taking of evidence whatever. That such inspection may be inaccurate, and in that way unjust, no one of course can question. No one can suppose that I intend in any way to reflect upon the Land Commission; they will no doubt do their best. Valuations placed upon holdings for the purpose of the Land Purchase Acts, however, have often been

judicially decided to be so. When the thing comes to be done wholesale, in respect of every separate holding on each of the estates (said to be 750 or so in number) within the ambit of this section, we can conceive how far they will be deserving of implicit and unquestioning confidence; for many of these 750 estates have hundreds of tenants, occupying separate holdings, upon them.

But while recognising that it will be the duty of the officials so entrusted to act fairly in the matter, and that they will do so according to their lights, there remains the fact that they are fallible, and that it would *prima facie* be a gross injustice to take any man's property away from him, leaving the price of it to be so settled, if there were nothing more to be done. It is not alone the right, but the bounden duty, of the Land Commission as guardians of the public purse, as well as of the tenants, to keep down the price to the lowest possible figure; and they have shown that they are fully alive to the obligation. Inasmuch as the purchase-money of holdings under this section must be paid by the Land Commission, a compulsory sale to take place at a price to be based upon the report of a Land Commission is in reality a compulsory sale to the purchaser who is to fix his own price.

2. But then the Land Judge is to give all parties an opportunity of being heard before he fixes the price at which the holdings are to be offered to the tenants. Heard on what? It is argued, and I for one am entirely satisfied, rightly argued, that the parties under this part of the section can be heard only on the question of price. The whole scope of the sub-section (b) shows this.

It was thrown out that at the stage we have now reached the Land Judge might, by virtue of some inherent equitable jurisdiction belonging to him as a Judge of the Chancery Division, take into account other considerations. He is a Judge of the Chancery Division of course; but I am not aware that in that capacity he has any different jurisdiction in reference to any equity whatever than that which is possessed by the Judges of the Queen's Bench Division or Exchequer Division. Let that pass; he is a Judge of the High Court, and as such has high powers and great authority. I am, however, unable to see any power he has to

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violate an Act of Parliament. If it be clear that in certain specified events the property of A B is to be transferred to C D at a price to be fixed by E F, and that E F is the person who is to pay the price so fixed, it is nothing short of sarcasm to speak of "equities" in the transaction at all. But what are the suggested equities?

I have sought with the keenest anxiety to learn what they are; for had the view of the majority of this Court been such as would have given me any assurance that there was room in their view for the doing of substantial justice in such a case, even at this late stage, I should have been glad to suppress my views, and become silently bound by the better opinion of my colleagues. No one can suppose, of course, that I presume to say that I am right, and they wrong in this matter. Their decision is founded, as mine is, upon the statute, and in my view the responsibility is with the lawmakers. I have not yet heard anyone say, however, that the construction this Court is placing on the section makes it otherwise than contrary to natural justice.

What equities then can the Judge take into account?

I have been unable to hear of any but two, viz.:—1, if the owner can pay off the incumbrances and so place himself in a position to get rid of the order for sale and receiver; and, 2, if the owner and incumbrancers all consent to discharge the order for sale or the receiver. These are mere futilities, even if they could be considered at all at this late stage of the proceedings, which I entirely deny. To quote Mr. Healy's language, "the bolt is shot," at latest when the estate is submitted to the tender mercies of the Land Commission; and if there is anything clear in this enactment it is that from that stage on all is compulsory. In this I entirely concur with the learned Judge (Mr. Justice Ross). I shall, however, consider this question of equities again in another context.

Well, we have got this "inspection" and "report" now before the Judge, for what they are worth. How long it will require, and at what cost, to inspect and obtain reports by two Commissioners upon every holding in the estate under the section does not appear. But, suppose it does, what then? The Judge is also to consider "any offers that may be brought before him for the pur-

chase of the estate or any part thereof." This is stated in a very casual way—"that may be brought before him!" It may be, however, that it will be the duty of the Judge to invite tenders, though that is not stated; so small an omission in this context is hardly worth notice. But assuming, as I do, that it will be the duty of the Judge, under rules no doubt to be framed for that purpose, to do so, who will tender?

In the first place, you are to invite a man to tender for a property, with knowledge and notice that his tender will not, and cannot legally, be accepted, even if it be up to the full value, unless another person who is to be provided with the money to buy from public sources, shall refuse to buy it on the same terms. I should like to see an honest advertisement framed for such a purpose; for of course the person invited to tender must be told in it that even if he offers too much—a fancy price—the holding must notwithstanding be offered to another at a lower price. He must be told, too, that he is asked to tender merely to enable the Judge to make up his mind on what terms the holding is to be sold to someone else.

But this is not all, nor by any means the worst of it. The competitor with the tendering capitalist is the tenant in occupation. I wish to say nothing hard, nothing that can reasonably be taken as reflecting on any person; but to say that in Ireland, at this period of the history of the land question, any tenders or offers procured under such circumstances could afford a test of the value of the interest in the property is to outrage common sense. No offers whatever, of any real, genuine, *bona fide* sort, such as would afford any presumption of the correct value, are likely to be brought before the Judge under such circumstances; and I am most definitely of opinion that this suggestion of "offers" is illusory, and may be discarded from consideration as regards the vast proportion of the cases involved.

But then the Judge has to consider "any other matters that may be brought before him, and the general circumstances of the estate." What is the meaning of these "other matters"? I confess myself unable to say. It may mean evidence of value, though I cannot myself see that it does. It does not mean "the general circumstances of the estate," whatever that may mean,

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for they are to be considered in addition. Whatever it is, however, there can be no doubt it must mean something connected with value; perhaps biddings at a previous abortive sale, the price paid by the owner for it, or the like, though these could not afford much help, I should think, in most cases. It cannot mean, "after hearing evidence" simply. The Land Judge is not here acting as a Land Commissioner, and may know little of the value of land. At any rate he is not directed to take evidence—only to consider matters that may be brought before him—and if he has to hear evidence of value on both sides with expert and other witnesses, &c., on both sides, as to every holding as well as every estate, I don't envy him his task.

It is thus clear that practically the Judge will have to consider the report of the Land Commission and, perhaps, some other matters bearing on value, the nature of which is to be stated, and these alone.

When he has completed these considerations, the next thing is that the holdings "shall" be offered to the occupying tenants, at what the Judge deems a fair price. A question here arises: it would, perhaps, also arise even if the section had been held to be to some extent discretionary: viz. what is to be done if the price arrived at by the Land Judge is in excess of the amount which the Land Commission is prepared to sanction? The offer, as I have said, is to be made by the Judge through the Land Commission. Can the Land Commission be called upon to offer a sum out of public money in excess of what they think reasonable? For I take it as clear, that if the offer be once made and accepted, it must be binding on all parties. Is the Land Judge to be at liberty, proceeding upon a report of the Land Commission as the chief, if not the sole, means of information before him, to overrule the Land Commission, and at his sole discretion give away public money for nothing? Or again, is the offer to be limited, as to public money, to the sum reported by the Land Commission, and is the balance to be made up by the tenant? a thing the Land Commission has very properly refused in many cases to sanction. Or is the offer to be wholly illusory? In practice, probably the Land Judge would feel himself bound not to exceed the limit of the money value fixed by the Land Commission. If he

do exceed it, there may arise a very pretty question between him, and the Land Commission, and the Treasury.

Such considerations as these show that this extraordinary piece of legislation has not been thought out by those who have enacted it, and that obvious difficulties of the gravest kind, lying on its very surface, have not been seen, or have been shirked; but this particular one is more than a question of practice—it is more than an embarrassment; it goes directly to pulling down the price to be paid for the confiscated property: “and the sale shall be completed accordingly.”

All these observations would be irrelevant if it were clear that the whole section in all its parts is mandatory. The Courts have nothing to do with questions of hardship if it is clear that the Legislature has really enacted provisions which entail them. Our duty is to interpret.

But in considering words which it is assumed are in themselves doubtful, the results of different possible meanings are legitimate matters for consideration in reference to construction. If it be the case that the 40th section is ambiguous *per se*, capable as well of a mandatory as of a permissive meaning (which I do not for a moment admit), and if the former will lead to gross and palpable injustice, while the latter injures no one, I think we are bound to choose the latter. Still there may be many instances, it may be the majority of instances, in which notwithstanding all I have pointed out, it may be beneficial and right, in the interests which it is the duty of our law to protect, to call into operation the provisions of this section. The real question is whether it must be applied in all cases, whether it be just or unjust to do so. It is not denied that the section is wholly compulsory when once the Land Commission has been called into operation. Every step after that is “shall.” Is the Judge bound by the same mandate to take that initial step, with all its consequences, in every case in which an absolute order for the sale of an estate “comprising holdings to which this section applies has been made under the Landed Estates Act, 1858, and either a receiver has been appointed over the estate, or the estate is so circumstanced that it would independently of the Act be sold without the consent of the owner as to ‘price’”? ?

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This must turn upon the only words which can be relied on directly for the purpose, viz. the words "at the request of the Land Judge."

It has not been contended, so far as I have heard, that these words, by themselves are imperative. "A B shall do a thing at the request of C D." No doubt this is mandatory upon A B, when requested by C D.; but it is absurd to say that without more it is mandatory upon C D to make the request. *Prima facie* at all events it is optional, or discretionary, to him to make it or not. This is not matter of specially legal interpretation. It is a mere question of English grammar. I need not labour this.

But the answer is, as I understand it:—"The words themselves are not imperative; but they become so from the context. It is a small and petty thing to dwell upon mere words, specially such a trivial thing as a 'request' in a general enactment in which the 'request,' though necessary as a preliminary, is yet a mere formality, ancillary to what follows, viz. a sale by compulsion to tenants, when the prescribed considerations exist; and the great political interests involved, and the drift of policy observable in the code of which this section is a part, require the interpretation which leaves to the Judge no option in the matter."

I own that the making of a request under the section is, in one sense, but a small thing. But it is in reality an enormous thing, when the results that follow are considered. It is a small thing to pull the trigger of a gun; an infant's finger can do that. But if the gun be loaded, and able to kill at 4000 yards, it is *not* an unimportant thing. The question here is not about the request by itself, but the great and vital question, whether the estate shall and must, with or without the consent, according to, or against, the judgment of the Judge, be offered on sale to the tenants at (it may be) half its value. The learned Judge here has held that he has no discretion. In this point alone I differ from him. But at any rate if the request is subject to a judicial discretion, it matters not whether the request itself is a small matter or a great. There will be an opportunity of preventing gross wrong.

The arguments from the context of the section (as distinct from policy, are only two, possibly only one. The clauses in question are introduced by the words:—"The following provisions

shall have effect"; and it is said these words are coercive, depriving the Judge of any discretion he might otherwise have had. But for the fact that this argument has apparently some weight with the Lord Chief Justice (I am not sure if any other member of the Court rests upon it), I confess I should have been at a loss to conceive how it could have been supposed to have any force at all. No doubt, the provisions must have effect; but that means have effect in their proper sense—mandatory where mandatory, discretionary where discretionary. It cannot be meant that they shall have effect contrary to their effect. It is not that they "*shall* have effect, whether the discretion left with the Judge shall be exercised or not." The words mean, and can mean, no more than "be it enacted."

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In old times every separate section of an Act of Parliament commenced with separate enacting words:—"And be it further enacted by and with the authority," &c. But in truth this phrase, "shall have effect," is nothing but a statutory common form. It is very frequently used in modern Acts of Parliament as a succinct mode of avoiding the *oratio obliqua*. I mentioned during the argument some instances of this use of the same or equivalent words, notably in the Settled Land Act, 1884, sect. 7; the Land Law Ireland Act, 1887, s. 14 ("shall apply"), s. 29 ("shall have effect"); the Local Government Act, 1894, s. 19 ("shall have effect"), and s. 20 ("shall apply"), and some dozen other public statutes taken almost at random from the statutes of the last four years, and turned up by me in half-an-hour. Had I gone further back I could have multiplied these instances by ten at least. "Shall have effect" merely means "shall apply," or "shall come into operation." I need not dwell further upon this point.

But the other suggestion founded on context is that the word "receiver" does the whole thing. This, of course, means that the case of an estate being ordered for sale, and a receiver appointed, is one within the general policy of the section; and, therefore, whether it is a matter of policy, or a matter of context, there is an indication of intention that all estates ordered for sale—over which a receiver has been appointed—shall be sold without consulting the owner or incumbrancers, without any discretion of the Judge,

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and even against his sense of right. How is this? No doubt, unless a receiver has been appointed, or the estate is insolvent, the Judge cannot send the matter to the Land Commission. But must he, if a receiver has been appointed? Logically, it cannot be suggested that the argument is otherwise than a case of undistributed middle. "No estate, in reference to which the statutory conditions do not exist, shall be compulsorily sold under it. But in this estate the conditions exist. Therefore, it shall be compulsorily sold."

But, rising above logic, it is said we are to see in this section the manifestation of a great broad policy, viz. that estates under receivers are to be treated as a sort of nuisance; that receiverships are to be put down; that estates over which receivers are appointed, or may be appointed, must be sold, and must not be sold by public competition, but shall be sold without competition to the tenants, against the wish of everyone who has any interest in the estate to be sold.

As to receiverships, I am necessarily more brought into judicial contact with them than the other members of this Court; and I say distinctly that the estates, which are under receivers in the Chancery Division, are, so far as my observation extends, better managed, on the whole, and taken in the average, than those which are under private agents. I have before me in the Rolls Court ten complaints (actions, summonses, &c.) against agents for one against receivers; and though it is true that in small matters the receivers do not come before me directly, yet their conduct and accounts do in a vast number of instances. So far as scandal is concerned, or anything of the kind, no legitimate grievance in regard to the management of property by receivers can be said, as a general statement, to exist. The tenants' rents are well collected by them; better than by private agents. The estates suffer nothing by their management. If the incumbancers thought they did, they could press for a sale, and if so, a sale ought to follow and would follow in the discharge of the duty of the Judge.

But (the argument proceeds), granting this, the Queen's Courts ought not to be made the medium for managing estates, i.e., of intercepting their rents, and paying them to the persons entitled. Why not? A receivership is an equitable execution.

Why should not the Courts of the Queen see to the enforcement of its judgments where it is the best remedy the creditor has?

If the rents pay the incumbrancers their interest, and if they know that a sale under the peculiar conditions of this section 40 will only pay them half their principal, why in the name of common sense and common honesty ought the land to be sold against their will and that of the owner? The receivers cost the public little or nothing. It is not a question of cost. What right has anyone, tenant or otherwise, to complain?

But we are told by Mr. Healy that in some way (unexplained) these estates are "waterlogged." I take it, that means that they cannot be sold. I answer they can be sold just as well as if they were not incumbered. There is no difference in that respect whatever. And if they are to be termed "waterlogged," it may be remembered that there are worse things than that; and it is better to be on a calm ocean even though waterlogged, than, as here proposed, on a reef, in a gale, on a lee shore.

But if it is seriously argued that a policy to sell all estates in which the two conditions exist, against the will of the parties, contrary to the discretion of the Judge, without his sanction, in this peculiar way, is to be spelled out of this short section, I think the contrary can be proved without going beyond it, by considering what it enacts, and what it does not enact.

Assuming that the indefinite prolongation of receiverships is not to be desired, and that the 40th section is intended to meet that view (though it does not say so), is there any such grievance, or complaint, or objection, except when the receivership is prolonged unduly? On the contrary, the tendency of public policy is manifested in the Judicature Acts by a vast increase in its application. If an old and waterlogged estate ought to be broken up and sold for its old timber and iron, it has never been suggested that there is any reason why the same result should flow from the appointment of a receiver the other day.

Yet if the section is mandatory, it plainly applies to the case of a receiver appointed yesterday, as well as the estate over which the receiver has collected the rents honestly and well for twenty years. There can be no policy that an estate must be given away

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But further, this presumed general policy against receivers would apply to all estates and all properties equally; and one would expect, if the policy were to be developed into an Act, to find some recital, or some general statement of the grievance. But here is none. Is there a general policy against receiverships? No, for this sect. 40 only deals with one class of holdings (agricultural or pastoral) and leaves all the rest out. What is to become of an estate, when some of the tenancies are within the section and others not? The receiver must remain over the latter, so far as this section is concerned. Further, it only applies to cases where the sale has been ordered by the Land Judge's Court; omitting all cases (and there are many) where the order for sale has been made by the Court of Chancery, or where there is no order for sale at all.

But by far a more important consideration, and one in which I take the deepest interest as a Judge of first instance in the Chancery Division, is this. In many cases in administering trust estates in Chancery it occurs that a decree for sale of lands has to be made in respect of the property of minors (for instance), while at the same time an immediate sale is not necessary or desired by anyone, and it is expected or hoped that by prudent management a sale may never become necessary. In these cases, a receiver is nearly always needed for the protection of the rights of all concerned. The course has been in such cases to order a sale, which is normally to be carried out in the Court of the Land Judge, on a petition and order for sale. Such cases are not few. They are very important, as dealing with the rights of persons under disability, and therefore peculiarly under the care of the Court. In some cases the property, well managed in the meantime, will clear itself, and be saved for the owners; and no Judge, if he had a discretion, would, against the will of those whose rights alone are affected, order a peremptory sale at all, much less a sale under the terrible provisions of this section. But we are going to decide that the Judge has no option and no voice in the matter—*Ad leones!*

Or take the case of an estate in settlement with a life estate outstanding, and the full prospect that on the fall, say of an old

life, the incumbrancers will be cleared off by the remainderman, funds being set free for the purpose, or provided by insurances, as often happens. This is not to be regarded; not to be noticed by the Judge; not to be brought before him, or listened to at all. A suggestion has been made that there is some inherent power in the Court to postpone sales. I agree that in any view there must be some power of dealing with the time of sales, for 750 estates, comprising (it may be) 7500 holdings, to be separately surveyed, valued, and reported on, &c., cannot all be dealt with simultaneously. But is it meant that any delay can be caused by the Judge for the purpose of avoiding the necessity of sales in the cases I have put, if the section be imperative upon the Judge to sell? I shall listen for the answer to this with curiosity. My definite opinion is that, if the section be mandatory, the only delay the Judge can properly interpose must be for the purposes of the section, *i.e.* in order to enforce and carry out the sale, and not to avoid it.

Thus I am unable, either on the words of the section, or in any policy expressed or implied in it, to discover the element of compulsion. But there is much in both going directly to negative that idea.

It was at first contended that no hearing was to be accorded to anybody in the first instance at all. As I understand it, however, it is now admitted that there is to be some sort of a preliminary inquiry, and that it is not to be left to the Judge, or rather to the examiner or clerks in the office of the Judge, to decide off-hand that the case is within the section. The parties are to be accorded, as a favour, the right of debating whether there has been an absolute order for sale; whether there has been a receiver appointed; whether the owner's estate is within the definitions of the Land Purchase Acts; and whether it comprises holdings agricultural and pastoral, or partly agricultural and partly pastoral. I gather, too, that here "equities" may be considered; but these equities do not go beyond those I have referred to already, *viz.* is the owner able at the moment to procure consents of all persons having an interest in the proceeds of a sale, and discharge the order for sale and the receiver, or can he pay them all off? So far as this sort of inquiry, or opportunity, or whatever it is called, is concerned,

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it is either a mere formality, or a sham. Incumbrancers, even though receiving their interest through a receiver, and content with their position for want of a better, cannot consent to his discharge; and to afford an incumbered owner an "opportunity" of paying down in cash, principal, interest, and costs, will be in most cases a proceeding savouring of cynicism. I have heard no proposal going further than this.

But now take the alternative branch of the section. When the order for sale has been made, and without any receiver, "the estate is so circumstanced that it would, independently of the Act" of 1896, "be sold without the consent of the owner as to price," then it is to be given to the tenants "at the request" of the Land Judge. Can this too be done without a full inquiry as to all the circumstances of the property in the first instance? How is the Judge to know that the estate is so circumstanced? What are the elements for his decision? Of course the "circumstances" mean that the estate is incumbered beyond its value. Is he to take the certificate of his own officers, who can know nothing about it, without hearing those who know everything? Yet the words are the same. It is the same clause that does both things.

And more powerful than these considerations, there remains the one great fact that this section itself refers to and is founded upon the Landed Estates Act of 1858—section 55 and the rules framed under it (27, 28, 29, rules of 1859), which, by sect. 30, have the same force as an Act of Parliament.

By sect. 55 it is enacted that—"Where the said Judge shall make an order for sale, the land or part thereof to which such order shall relate shall be sold, by or under the control and direction of the said Judge, by public sale or private contract, together or in lots or parcels, at such times and places, and generally in such manner as the said Judge may think fit, and the conveyance or assignment of the land or part thereof shall be made by the said Judge under the seal of the Court, and shall be signed by the said Judge, and the execution by any other party shall be unnecessary."

By Rule 27 of 1859 it was provided that—"Estates ordered for sale may be sold either by public auction or by private sale,

and at such time as the Judge may direct, and the sale of any lot may be adjourned or set aside upon sufficient grounds; but no sale shall be opened solely by reason of an advance being made in price. Sales shall take place in Dublin, unless the Judge shall otherwise direct. When the sale takes place in the country, a return of the biddings shall be prepared by the auctioneer conducting the sale, and signed by the highest bidder or bidders, and by the solicitor having carriage of the sale, and shall be verified by the affidavit of the said auctioneer, or the solicitor, and transmitted in a sealed envelope to the Examiner of the Judge before whom the biddings are to be laid for confirmation, within two days after the biddings are taken; and the Judge shall, after hearing all parties interested, either disallow the sale, or confirm it, and declare the purchaser or purchasers."

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Rule 28 provides that—"The actual bidder to whom a lot is sold shall in all cases be deemed the purchaser, and shall be liable to complete the purchase." It then provides that if he declares a trust for another person, that person shall be at liberty to lodge the purchase-money, and complete the trust, but that no trust should be declared after the day of sale without leave of the Judge.

Rule 29 provides that—"Every purchaser, after having been declared so by the Judge, shall obtain a certificate thereof from the Registrar's Office, upon which the purchase-money may be paid into the Bank of Ireland to the proper account and credit. The purchase-money is payable in fourteen days from the declaration of the purchase, and bears interest at £5 per cent. from that day to the day of payment; but the Judge may extend the time, or allow credit against the purchase-money, or may make any other order in relation thereto that may be just."

And Rule 30 provides that—"If the purchase-money and all interest payable thereon be not paid into the bank, or provisional credit obtained for such purchase-money, within fourteen days, or such further time as the Judge may allow, it shall be the duty of the solicitor having carriage of the sale to enforce payment thereof; or, by leave of the Judge, any other party interested may proceed by attachment or sequestration, according to the course of the Court, and the property may be re-sold." It then provides that

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the costs attending the re-sale with the deficiency (if any) in price, should be paid by the purchaser at the former sale.

This sect. 55 is not repealed, nor are the rules abolished, though the Act of 1896 repeals many other previous enactments. Sect. 40 recognizes, and proceeds upon the Landed Estates Act. The two sections must, therefore, be read together. I will test it this way. Suppose the tenants refuse the offer under sect. 40 when made, what then? Plainly sect. 55 and its rules remain untouched. They are, therefore, not impliedly repealed. How then can the two sections stand together? I think only by treating the powers of sect. 40 as cumulative, that is, as affording an additional alternative to the two methods (public sale and private contract), in the Act of 1858. Lord Justice FitzGibbon will, I believe, express his views in more detail on this point than I have done. I am aware of his opinion upon it, and entirely concur with him.

I think, therefore (to summarize what I have said), that the words of this section are not mandatory to the Judge so as to deprive him of all discretion in applying it to any particular case, but that he has a judicial discretion in the matter to be exercised upon materials, and after hearing the persons interested, should they desire to be heard. But, even if the language used is ambiguous (which I conceive in this respect it is not), yet the consequences which would flow from adopting the "coercive" construction are so repugnant to natural justice that that construction ought to be rejected. I further think that there is no evidence of any general policy whatever in any way leading up to the coercive construction, and many considerations, in the section itself and outside it, of the opposite; while the construction I feel bound to adopt gives effect to every word of the section, and applies it in every possible case where it is just and reasonable to do so.

The order appealed from was one which the Judge had no doubt the power to make under the Landed Estates Act, 1858, under which it is made. But he made it against his own will, that is against his discretion, assuming that he had a discretion, because he thought that, although no application was before him, and no order was therefore to be made under the Act of 1896, that Act left him no option but to make the order under the Act

of 1858, and he invited this appeal for his future guidance. The judgment I have expressed, therefore, proceeds upon a view inconsistent with Mr. Justice Ross's order, and I am of opinion that that order should be reversed.

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The portion of this order which is the subject of the first appeal postpones, *sine die*, the sale by public auction of certain portions of the estate, which (a) consist of holdings which are agricultural or pastoral, or partly agricultural and partly pastoral; (b) for the sale of which an absolute order has been made; (c) over which a receiver has been appointed; and (d) the estate in which ordered to be sold is either a fee-simple, or is otherwise within the Land Purchase Acts. The order recites, as the reason for the postponement, that in "the opinion of the Court, under s. 40, sub-sect. 1 (a) of the Land Act of 1896, no discretion is left to the Court as to the making or withholding of the 'request' therein mentioned," and that "the Court has no jurisdiction to proceed with the sale by auction" of these portions of the estate, "before putting into operation the provisions of the said sub-section."

These portions of the estate being admittedly within s. 40, sub-sect. 1, if that section, upon its true construction, prohibits a sale by auction of estates within its provisions, until the offer mentioned in clause (b) shall first have been made to the tenants, the appeal must fail; and, in truth, whether such a sale is so prohibited is the only matter for *decision* upon this appeal.

The consideration of this question may be conveniently divided into two branches: (1) Does the sub-section impose upon the Judge, in a case within it, an obligation, as distinguished from a power, to make the request? (2) If so, to whom is that obligation due? or, in other words, who, if anyone, is entitled to waive its performance?

In the first instance, then, I shall consider the first branch: Does the sub-section impose an obligation? The provisions which it makes are seven in number, and are distinguished by letters, from (a) to (g). Two of them, (f) and (g), affect merely the subject-matter of the sub-section. A third (e) does no more than

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give an appeal from an order made under the sub-section. None of these clauses appear to me to be material to the question here.

There remain, then, for consideration four clauses (*a*), (*b*), (*c*), and (*d*); and it will be seen that (*b*), (*c*), and (*d*) form a group of provisions, all of which must be taken together and cannot be dealt with separately; so that in substance we have for consideration two clauses, one distinguished as (*a*), and the other composed of (*b*), (*c*), and (*d*).

Now, I have to observe that, whatever be the construction of the sub-section, whether the making by the Land Judge of the request mentioned in clause (*a*) be mandatory upon him, or only in his discretion, the object of the sub-section cannot be effected without the action of two separate tribunals, viz. the Land Judge and the Land Commission. It follows that any legislation, to be effective for the purpose contemplated, should impose duties, or confer powers, on each of those two tribunals. Accordingly, the sub-section appears to me to proceed to prescribe, in separate clauses, the duties or powers it intends to impose or confer upon each tribunal. The subject-matter of clause (*a*) is the duty or power of the Land Commission, and of it alone. The subject-matter of clauses (*b*), (*c*), and (*d*) is the duty or power of the Land Judge. They do not deal with any act of the Land Commission.

As, however, the sub-section is confined to estates of particular classes, it is plain that the duty of determining whether or not a particular estate is within the sub-section should be imposed upon one only of the two tribunals. Were it otherwise, contradictory decisions, in respect of the same one estate, might be pronounced by each. It is further plain that the decision by this tribunal that a particular estate is within the section, and the communication of that decision to the other tribunal, should precede any action by such other tribunal. Now, it is upon the Land Judge that the duty is imposed of determining whether a particular estate is within the section. Consequently, the duty of the Land Commission ought to be expressed to arise only upon communication of that decision to it; and this affords sufficient reason for the introduction into clause (*a*), which deals with the duty of the Land Commission alone, of the words "at the request of the Land Judge." In my view, those words were inserted to define the

event upon which the duty of the Land Commission was to arise, and not merely to indicate the duty or power of the Land Judge in relation to such request. The proper place for the indication of such last-mentioned duties, according to the scheme of the sub-section, naturally would be found, and the place in which, in my view, according to the true construction of this legislation, it is in fact found, is not this clause, but clause (b). This clause, however, shows that there is, at least, a power in the Land Judge to make the request.

I pass, then, from clause (a), as one which deals with the action of the Land Commission, to clause (b), which prescribes the duty of the Land Judge. By this clause it is enacted that the Land Judge, after giving all parties, including the tenants, an opportunity of being heard, and considering certain matters to which I shall hereafter refer, “*shall make* to the person appearing to be in occupation as tenant of each holding an offer to sell to him the fee-simple of the holding.” These words are absolute and unconditional. They leave no room for the exercise of discretion in the Judge as to whether he shall or shall not make the offer, and taken by themselves they would be plainly mandatory.

It is said, however, and it is upon this that the determination of the question must turn, that this clause does not impose any duty upon the Judge to make the request; that the obligation upon him under this clause presupposes the request having been made; that his duty to make the request must be found elsewhere; that to do so we must refer back to the antecedent clause (a); and that, as that clause (a) does not purport to impose such a duty, the action of the Land Judge under clause (b) must be dependent upon the exercise of a discretion under clause (a), and that, therefore, the entire of his action is discretionary.

It is at this point that, in my opinion, the fallacy in the reasoning arises. It assumes that clause (b) does not impose an obligation upon the Judge to make the request. In my opinion the clause does impose that obligation. Amongst the matters to be considered by the Judge, before he can make the offer under clause (b), and without which he is without jurisdiction to make such offer, is the report of the Land Commission, which it is their duty to make at the request of the Land Judge. But the express obligation imposed upon the Land Judge by clause (b) to make

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the offer implies an obligation in him to do all things within his power which are necessary to enable him to make that offer; and as the making of the request is admittedly within his power, and a condition precedent to his making the offer, the obligation to make the offer includes an obligation to make the request.

Were there nothing else in the legislation aiding this construction, I should for this reason alone be of opinion that the order appealed from was right; and it will be observed that, in arriving at this conclusion, I have not referred to the words "shall take effect," or attributed to them any meaning different from that put upon them by the Master of the Rolls in his judgment, viz. "Be it enacted."

But it appears to me that there are many other matters in the sub-section which coerce us to arrive at this construction. I wish to say here that I look to those other considerations, not for the purpose of gathering from them such an affirmative intention as would induce the Court, were the words in themselves *prima facie* discretionary, to read them as mandatory; but to see whether there is anything in them which will authorise the Court to alter what, to my mind, is the plain grammatical interpretation of the clause. If the words upon which the question turns were words giving a discretion, I do not pretend that there is anything in either the policy or the subsequent clauses of the Act that would induce the Court to modify their construction, or by reason of which it ought to strain to find in the words an obligation, as distinguished from a duty.

The matters I refer to are these :

First, whenever the Legislature intended to vest even a limited discretion in the Land Judge, it took care to do so in express terms, to safeguard the parties by giving them an opportunity of being heard, and to control the discretion by a clear indication of the matters by which its exercise was to be regulated. It is plain that, upon the receipt of the report, and in considering the terms of the offers which he is directed to make to the tenants, the Judge has a discretion as to price and as to conditions, but as to these matters only. Observe the language in which that discretion is conferred : "At such price, and subject to such conditions, whether as to the payment of part of the price in cash, or as to the offer to

one tenant being conditional on the acceptance by other tenants of the offers made to them within a limited time, or otherwise, as the Land Judge may consider reasonable and just, having regard to the interest of all persons interested in the estate." These words leave no room for doubt as to the intention of the Legislature; and the discretion, conferred in those clear terms, is to be exercised only "after giving all parties, including the tenants, an opportunity of being heard, and considering the report and any offers that may be made for the purchase of the estate or any part thereof, and any other matters that may be brought before him, and the general circumstances of the estate." Contrast these words, in which this limited discretion is conferred, with those of clause (a) which, it is said, confer the much wider discretion of determining whether he will or will not, in a particular case admittedly within it, put the sub-section into operation. In the one case, the discretion is conferred by express words: in the other, if it exists at all, it arises by implication. In the one case, the matters to be taken into consideration in the exercise of the discretion are carefully, nay laboriously, enumerated: in the other, there is an omission of anything which can regulate discretion. In the one, the discretion cannot be exercised without all parties who desire it being heard: in the other, there is no obligation upon the Judge to hear any one.

Secondly, if it were intended that the Judge should have a discretion wider than that indicated by clause (b), *i.e.* other than as to conditions and price—if it were within his power to decline to make the offer, in a case within the section—one would have thought that the most material matters to be considered by him before doing so would be the "circumstances of the estate," which are to be brought before him by the report; and thus the time for the exercise of the discretion should, in that event, have been after the report, instead of before the request. It follows that the natural place in which to confer the discretion would have been in clause (b); but that could have been done only by altering the whole structure of the clause, and by substituting words conferring discretion for the admittedly mandatory terms in which it is framed; and it, therefore, appears to me that, in the effort that has been made to construe those words as giving a discretion, the Court is

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asked to change the function of clause (a) into one defining the duties of the Land Judge, and, by reason of words that were used only to indicate an event, to do indirectly what cannot be done directly, that is, to read clause (b) as discretionary. The words, in my opinion, are too clear for argument.

The third reason for which it appears to me that, upon the true principles of construction, we ought to decline to imply the discretion contended for, is because in cases in which the sub-section is put into operation, it is plain that the tenants acquire a substantive right or privilege, in the nature of a right of pre-emption; and, to the extent to which they acquire this right, the property for sale is subjected to a new burden. In other words, when the right attaches, the tenants are entitled to something which they had not previously, and the property is subjected to an obligation to which, theretofore, it had not been liable. I think it inconsistent with the principles of our law that we should, without clear and express words, or necessary implication, attribute to the Legislature an intention to confer such a power upon any Court.

So much for the grammatical and ordinary sense of the words in clauses (a) to (g); and, of course, that construction must be adhered to, unless it is inconsistent with the language of some other clause (which is not pretended), or with the policy of the section, or of the entire statute. I do not think that much assistance can be derived from the policy of the statute as a whole, as distinguished from that of the particular section. But the policy of that section, by which I mean the reason why, and the persons for whose benefit it is enacted, appears to me to be very plain, and to entirely support the mandatory construction. It will be convenient to consider this in connection with the second branch into which I have divided this question, viz. to whom the obligation, if there be one, is due?

The section is one of part III. of the Act, and is therefore part of the code of Land Purchase Acts. The great principle of public policy upon which all those Acts were founded was that it was for the interest of the State to abolish dual ownership by buying out landlords; and it is clear that the tenants of agricultural or pastoral land were within the classes, if indeed they were not the sole class, for whose benefit those Acts were passed. The principal

machinery, however, by which the policy of those Acts was endeavoured to be carried into operation, by all the Acts prior to that of 1896, was by agreement between landlord and tenant, the State affording assistance by providing the entire or part of the purchase-money. The new principle introduced by this Act is that, in certain cases, dual ownership may be abolished, without the agreement of the landlord, which hitherto was essential. The estates as to which this exceptional mode of proceeding is permitted are of two classes.

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The first class consists of estates ordered to be sold, which are incumbered to their full value. I think that the Legislature legislated, in reference to this class of estates, upon the assumption that the interest of the owner therein was nominal, not real, and that therefore his consent to a matter in which he had no real interest could, without injustice, be dispensed with, in furtherance of that which seems to have appeared to them to be a matter of great national policy. The words by which this class of estates is described, "would independently of this Act be sold without the consent of the owner as to price," have been construed by Mr. Justice Ross, as I think rightly, to refer to cases in which, according to the practice as stated by Flanagan, J., in *Domvile's Estate* (1), he would not require the consent of the owner to the sale. Thus, as to one group of estates, which may be roughly designated as insolvent estates, the modification of the practice of the Court effected by the section is that, within a reasonable time, the indicated offer shall be made to the tenants, and that until such offer is refused, the estate shall not be offered for competition to the public.

The second class of estates within the sub-section are those in which "a receiver has been appointed." Those estates are within the section, although so circumstanced in respect of incumbrances that, before this Act, according to the practice as stated in *Domvile's Estate* (1), they would not have been sold without the consent of the owner. Thus, in relation to one class of estates, viz. solvent estates, we ascertain the factor which must have been, in the mind of the Legislature, that which determined the applica-

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tion of the sub-section : namely, was there a receiver over the estate ? Why is the existence of a receiver over a solvent estate to have the effect that a sale to the tenants may be made without the consent of the owner, who admittedly must be an interested party, whereas, but for the existence of such receiver, his consent would be essential ? In my mind there can be but one answer to this. It must have been that, in the view of the Legislature, it was for the public interest that receiverships over estates ordered to be sold should not be continued longer than was reasonably necessary ; in other words, that the estates should be sold within a reasonable time ; and to carry this policy into effect, the Legislature enacted that such estates might be sold without the consent of the owner, even in the mode prescribed by the Land Purchase Acts.

I hold that the governing reasons for this enactment were two, each a matter of public policy, viz. first, to further the abolition of dual ownership ; second, to prevent the continuance of receivers, appointed as ancillary to a sale, for a longer period than is consistent with their ancillary character. These reasons satisfy me that there is not only a judicial obligation upon the Land Judge to make the request, but that that obligation is one due to the public, as distinguished from the parties in the suit, so that consent by the owner or by the incumbrancers that matters shall, for all time, remain as they are, will not *per se* relieve the Judge from the performance of the obligation imposed upon him.

In conclusion, I desire to say one word as to the scope of the section. To be within it, the estate, admittedly, must be one for which (1), there has been an absolute order for sale ; (2), there must be either a receiver, or it must be so circumstanced that, before the Act, it would have been sold without the consent of the owner as to price ; and (3), it must be either agricultural or pastoral. That it must satisfy all these conditions is patent from the words of the enactment itself ; and even were there nothing else to be considered before the request was made, it is plain that there would be there a subject-matter for judicial action. In a case where no receiver has been appointed, he practically must settle the schedule of incumbrances. In any case, whether a receiver has been appointed or not, he must determine the

character of the holding. But further, the offer which is to be made to the tenants is to be "an offer to sell the fee simple" of their holdings; and therefore the estate in the land which is within the jurisdiction of the Land Judge, that is, the estate which is ordered to be sold, must be either an estate in fee-simple, or an estate within the Land Purchase Acts by virtue of which a fee-simple can be acquired. I am very clearly of opinion that, before making the request mentioned in the section, the Land Judge, not as a matter of discretion at all, but for the purpose of seeing that he is acting within the limited statutable jurisdiction conferred upon him, ought to satisfy himself judicially of the existence of these four conditions, which are precedents to the existence of his jurisdiction.

But again, all these proceedings are proceedings that are to be taken with a view to a sale by the Land Judge, and the conveyance upon that sale passes an indefeasible title; and I therefore hold that, although the Land Judge is not absolutely bound, as a limit to his jurisdiction, to satisfy himself that the title is a good title, before he makes the request, it would be a convenient and sound exercise of judicial discretion, that he should satisfy himself that the title is such that the proceedings would result in a sale before incurring the expense of sending the request. All these matters seem to me to afford a complete answer to the observation of the Master of the Rolls, that it is difficult to see why on the mandatory construction it was on the Judge that the duty of making the request was imposed. I conceive also that, in relation to the matters I have indicated, the parties ought to have an opportunity of being heard; and therefore I entirely agree in the suggestion of the Lord Chancellor, that a notice ought to be published by the Land Judge, before he makes his request, calling upon the parties to appear before him, or giving them notice that they will have an opportunity of appearing before him, and hearing them before the request is made.

I have further to add that it appears to me that, although the words of the section, which indicate that the existence of an absolute order for sale is an essential condition to the application of the section, are in the past tense—that such an order "has been" made—the Legislature, by those words, intended that the order

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should be an existing one, in the sense of being one which some person had a right to insist should be proceeded and acted upon, and that the Legislature did not intend to affect any right or equity which might exist against such order being proceeded upon; and therefore that in such cases as were put during the argument, of all incumbrancers who had a right to a sale having been paid off, or of the owner and all the incumbrancers consenting that the order for sale should be set aside, and the receiver discharged; or of the receiver, as in the case of many minors' estates, being continued merely for payment of an annual charge affecting the rents and profits; or if any other circumstances existed which would entitle the owner, or any other person interested in the estate, to have the order discharged, I am of opinion that such right would continue to exist notwithstanding the Act; and I conceive that if the existence of such a state of facts were presented or suggested to the Judge, it would be right that before making the request he should afford time to make an application to set aside the absolute order. But my view is, that in all such cases the parties ought to be put to an application to discharge the absolute order, the request being stayed for a limited time in order to enable that application to be made.

There is another case which I wish to mention, that of an estate over which a receiver has been appointed, and which is more than sufficient to satisfy the incumbrances. I hold that it would be against right that, in such a case, the Court should proceed, against the will of the owner, to sell more of the estate than was necessary for the purpose of paying off the incumbrances; and I would hold that as soon as the Land Judge has sold sufficient for that purpose he should stay his hand, and not proceed further with the sale, and therefore that he should not make an offer to the tenants of more of the estate than was necessary. In other words, I hold that the entire of this section contemplates the existence, not only of an absolute order for sale, but of an effective absolute order for sale, which the owner has not a right to have set aside; and that the proceedings are to go on for the purpose of carrying into execution that absolute order for sale, to discharge the incumbrances, and for no other purpose.

Further, in some cases the facts may be such as would, before

the Act, have justified the Court, in the exercise of its discretion, in putting a temporary stay upon proceedings under the absolute order. If, for instance, the owner gave the Court reason to believe that, within a limited time, he would be prepared to pay off the incumbrances, and have the receiver discharged, in my view the Land Judge would be entitled to take such a matter into consideration, in determining what was the reasonable time within which he should make the request; but certainly, in my view, he is not entitled to make an order staying the proceedings indefinitely, the absolute order continuing to stand, and the receiver continuing over the estate.

I wish to say one or two words in reference to some of the remarks of the Master of the Rolls when he was giving judgment.

I do not presume to become an apologist for this Act. I do no more than look through its provisions, for the purpose of ascertaining the intention of the Legislature; and I do not conceive that I have any right, when I have once ascertained clearly what that intention is, to consider whether it imposes hardship upon particular classes. But there are one or two observations that were made which, I think, are not supported by the terms of the Act. The Master of the Rolls asks what is to happen, supposing the price at which the Land Commission fixes the value of the holdings, or of a particular holding, is a price less than the Land Judge indicates as being the price at which he will accept an offer. Well, in my mind, the Act of Parliament leaves no doubt whatever on the subject. The tribunal to fix the offer is the Land Judge; and if the Land Commission do not think proper to advance that amount to the tenant, and if the tenant is not able, by moneys of his own, to supplement the amount which he can obtain from the Land Commission, so as to be able to pay the price at which the Land Judge will accept him as purchaser, why, then, the offer cannot be accepted; and in my opinion, if an offer is made, and not accepted within a reasonable time, there is an end, so far as that holding is concerned, of this legislation, and the Land Judge is at liberty to sell the holding to any one he thinks fit, in the way he would have sold it prior to the passing of the Act.

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I have already stated why it is, in my mind, that the duty is thrown upon the Land Judge of making the request. It is not a formal act—it is not a ministerial act; it is an act which, in my opinion, ought not to be done until the Land Judge first satisfies himself that the case is within the section; and to do so I have already shown involves many matters of judicial discretion.

Other cases were put—cases in which an estate, as I understand, was secondarily liable for a demand; insurances likely to become payable in a short time, being either the primary fund or equally liable. Well, I do not think it is possible, in the discussion of an Act of Parliament of this description, to meet every particular case of hardship that may be put. In my view, a great number may arise in the carrying out of this Act of Parliament. Take the construction that is contended for, that there is a discretion in the Land Judge, and the Land Judge exercises his discretion, as probably he would in a great number of cases, by saying that the request should go—even in those cases a great deal of hardship may arise. It is impossible to say, in ascertaining the price of an estate, when offers are invited, that the fact that, at the very time a price is being fixed by competition between outsiders and the tenants, the outsiders know that unless they outbid the tenants they cannot become purchasers, is not an element which may work hardship in certain cases. Still, it is plain that the Legislature thought that that was a hardship which ought to be undergone in particular cases; and if that seemed good to the Legislature, it is impossible for us to construe the Act upon the assumption that it was not contemplated that hardship might arise from the operation of the Act.

In my opinion, the plain words of this Act of Parliament are mandatory upon the Judge. I can find nothing in any other part of the Act which would justify me, upon sound principles of construction, in reading as discretionary words that are couched in such mandatory terms; and for that reason I thoroughly agree that the order of Mr. Justice Ross was right, and that the appeal should be dismissed with costs.

FITZ GIBBON, L. J. :—

The circumstances under which this appeal has been brought

and heard make it our duty to give any help to the Land Judge, in acting under sect. 40, which a full statement of our construction of that confused, if not chaotic, clause can afford. In practical result I concur with the Master of the Rolls, though I do not think it necessary to hold that the Land Judge has a discretion to sell any estate within the section to an outside purchaser without first making an offer to the occupiers. The discretion which I hold him bound to exercise rests on the nature and origin of his jurisdiction to sell, and it will, in my opinion, be his duty to exercise that discretion, judicially, as well when proceeding to sell under sect. 40, in accordance with the order which this Court is now about to make, as in other cases.

The appeal does not purport to be brought by leave of the Land Judge under sect. 40 (1) (e). The scope and effect of that clause may be open to question; but I treat the appeal as having been heard in the exercise of our ordinary jurisdiction.

The judgment in *Grogan's Estate* (1) puts in the clearest language the question which the Land Judge decided, and which he desired to submit to this Court. Ross, J. says:—"What I have to consider is whether I am at liberty to permit the sales to proceed in the ordinary way. . . . Sensible as I am of the hardships which may probably result from stopping these sales, I cannot allow such sales to go on. . . . I am unable to find in the section that any discretion has been left to me, as Land Judge, other than a discretion as to the order in which the sales are to proceed. I hold that the section is mandatory . . . in all cases that fall within its scope. Every case now before me in which a receiver has been appointed is clearly within the section, and I am not at liberty to permit the sale of any such lots to proceed. I consider that I am bound to put the section into operation in such cases by issuing my request to the Land Commission at the proper time. I think that the Land Commission are bound to comply with the request, and I shall be then obliged to offer the fee-simple to the occupying tenants at such price as I think just. Until all this is done, the section prohibits the ordinary sales of agricultural and pastoral lands in the occupation of tenants, and

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over which a receiver has been appointed, from taking place. The tenant has acquired a right he never had before, namely, a distinct interest in a sale, of which I cannot lawfully deprive him." The subsequent judgment in *Owen's Estate* merely repeats the same views—"The question is whether the Land Judge has any discretion in the matter of putting the section into operation. . . . If I had had any discretion I would have exercised it, by allowing the sales to proceed. . . . I am of opinion that my former decision was right—that the section is mandatory. The object of the section is evidently to clear the Court of estates by sale, where the owner is cut off from the collection of rent by the appointment of a receiver, or when the estate is hopelessly insolvent. . . . In order to effectuate this object certain preliminary steps must be taken." He negatives the existence of any discretion, and says—"There is nothing in the Act to guide the Court in the exercise of its discretion." He holds the sending of his request to the Land Commission to be "merely ancillary," and he decides that if he holds that a case comes within the scope of the section, the Land Commission must act on his request, and the Judge, in turn, must act on their report by making an offer of the estate to the tenants, and if this offer is accepted, the estate must be sold. The procedure upon which Ross, J. has entered, in order to give effect to this view of his duty, was stated at the bar. We were told that he is now engaged in preparing a list of *all* the estates (said to be some 750 in number), comprising agricultural or pastoral holdings, in which an absolute order for sale has been made, and a receiver has been appointed, with a view to sending forward his request, in each and every one of these cases, in order of date, beginning with the estates which came into Court before 1881. This is being done by the Judge as "the only course open" to him, of his own motion, without hearing any of the parties, in obedience to the statute which he holds to have deprived him of all discretion as to sending forward the request, and of all power of controlling the effect of that request in ultimately leading up to a forced sale.

Though I have not heard any clear or consistent statement as to the limits within which the Land Judge may exercise a discretion under the order which the majority of this Court is about

to make, the judgments of the Lord Chancellor, the Chief Justice, and the Chief Baron have indicated that a stop must be put to the automatic action of the Land Judge, and that, *in every case*—even in cases of insolvent estates already brought to the very brink of a sale—he must hear all parties upon the question whether his request is to be made or not. His jurisdiction—and consequently his duty—to delay or withhold his request, have been expressly recognised where “special circumstances” can be shown. As he is directed to give notice, and to hear all parties, there must be at least a possibility, if not a probability, of some question to be heard and determined in every case. As the decision of that question is not a matter of positive law, it necessarily follows that, according to the unanimous decision of this Court, the section is not absolutely or universally mandatory, as Ross, J. thought it was; and that there is jurisdiction to delay or to abstain from putting it into operation.

What then are the origin, the nature, and the limits of this jurisdiction, which, arising as it does upon “special circumstances,” must be, to some extent, judicially discretionary?

I entertain a definite legal opinion upon this question, and I proceed to state it. My answer rests upon the Landed Estates Act, 1858, and the practice established under that Act, which is recognised by the Act of 1896. *Some* discretion is recognised by every member of this Court—it has been vaguely stated by the Lord Chancellor that that discretion *ought* to be exercised where undefined “special circumstances” exist—but I am, equally with the Master of the Rolls, unable to find any clear guidance as to what circumstances ought to be regarded as “special.” I am therefore bound to state my view of the law, as I understand it, which confers the discretion which the Land Judge, in my opinion, possesses, and is, in each case of a sale, bound to exercise.

When the Chief Baron finds the mandate to send the request under sub-sect. (a)—*i.e.* “to shoot the bolt”—in the mandate under sub-sect. (b) to make the offer after the report of the Land Commission has been received—*i.e.* while the bullet is on its way to its billet—it would be hard to find a better instance of begging the question. A mandate to do a consequential act does not necessarily make the prior act mandatory. I must look for

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some other guide to the effect of (a) than the mandatory words of (b)—which are not to be found in (a)—and I follow the rule laid down by the Chief Baron, in another part of his judgment, when I decline to attribute to the section an effect which its words do not enact or imply.

Sect. 40 applies to the Court constituted by the Landed Estates Court Act of 1858. The jurisdiction to sell any estate is conferred by the Act of 1858, s. 55, and is regulated by the rules and practice under that Act. Any incumbrancer, on showing a *prima facie* title to an incumbrance upon the land included in his petition, is entitled to an absolute order for sale. This absolute order for sale has hitherto been in reality, whatever it may be in form, no more than an affirmation of the right of the petitioner to payment out of the land, and of the jurisdiction of the Court to sell. So far has this been the case that by Rule 28 of 1878, no receiver can be appointed until after the order for sale has been made absolute, except in such urgent circumstances as would in Chancery have warranted the appointment of a receiver before decree. The actual sale is never *ex debito justitiæ*, though the order for sale is so. *Quirke's Estate* in this Court (1) laid down—“*The Court has a discretion not to sell.*” Sect. 55 directs the mode of sale, taking the matter up *after* the absolute order. “Where the Judge shall make an order for sale, the land, or *part thereof*, to which such order shall relate shall be sold, by or under the control and direction of the Judge, by public sale or private contract, together or in lots or parcels, *at such times* and places, and generally *in such manner*, as the said Judge *may think fit.*” The Chief Baron admits that there is no mandate to sell more of an estate than is required to pay incumbrances; yet sect. 40 is, in terms, equally, if at all, mandatory as to the whole.

Under the existing law and practice, a vast amount of property has been brought into the Landed Estates Court, which is now a Division of the High Court, combining the functions of Chancery with those of a Court for judicial sales. Management by receivers of estates which, though incumbered, are not insolvent, is a common function of the Chancery and Land Judge's Divisions.

Both these Divisions have hitherto co-operated in exercising this jurisdiction, without any reason to apprehend that the appointment of a receiver by the one would have any more effect in forcing a sale than the like appointment, if made by the other. Under this belief, orders for sale have been made absolute as "merely ancillary" to the appointment of receivers, through whose official management, if permitted to proceed, these estates would clear themselves without ever being sold. The Chancery Judges have in many cases sent estates into the Land Judge's Court for the appointment of receivers where they never contemplated a sale, and where they would have made the appointment themselves if they had any idea that a sale would follow. In such cases the Chancery Judges have been caught in a trap, if a compulsory sale is now made mandatory by the Act of 1896. We would be entitled to attribute knowledge of the practice of the Court to the framers of the Act of 1896, even if it were silent on the subject, but sect. 40 itself defines one class of estates by express reference to that practice, when it speaks of an "estate so circumstanced that it would, independently of this Act, be sold without the consent of the owner as to price." The practice as to incumbered estates, even where some of the incumbrancers were pressing for a sale, is quoted from Flanagan, J., by Ross, J., in *Grogan's Estate* (1):—"I never sell property here relying merely on my own judgment, and without consulting the parties whom I consider interested in the proceeds of the sale, that is to say, in the case of incumbered estates, the persons representing the incumbrancers, and in the case of perfectly solvent estates, the owners of the estates." Ross, J. adds:—"In the cases of petitions filed by incumbrancers or owners of incumbered estates, it has never been the practice of this Court to sell more of an estate than might be sufficient for the discharge of the incumbrances affecting the estate." The words "part of an estate," which I have quoted from the Act of 1858, sect. 55, plainly limit the jurisdiction to sell to such part only as is necessary for the discharge of incumbrances, yet the absolute order and the appointment of the receiver, will, in every case, include the whole estate.

(1) [1896] 1 Ir. R. 614.

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How, in such cases, do the majority of this Court propose to limit their mandatory construction of sect. 40? The only expressed conditions precedent to its application are (1) an absolute order for the sale of an estate comprising holdings to which the section applies, and (2) *either* the appointment of a receiver, *or* the estate being "so circumstanced that it would, independently of this Act, be sold without the consent of the owner as to price;" (2) is an *alternative* clause. If Röss, J. is right, as I think he is, in understanding the latter words as covering insolvent estates, then the prior alternative must refer to solvent estates over which receivers have been appointed, and the full effect of the section, whatever it is, must be given against every such estate, including estates of which part only needs to be sold for payment of incumbrances. May I ask how the part is to be selected which must be offered, if the whole is not to be sacrificed?

In the face of such difficulties as these, it is not credible, to my mind, that all discretion in forcing a sale has been taken away in all cases. The estate over which a receiver has been appointed may be an estate of which the fee is lightly incumbered, though a life estate in possession may be heavily mortgaged; it may be (as the King-Harman estate, one of the largest in Ireland, already before this Court, was) an estate held upon trust to pay off incumbrances during a long minority, and annually reducing those incumbrances out of rents and profits; it may have been sent into the Landed Estates Court from the Court of Chancery for the appointment of a receiver, and the order for sale may have been formally made merely to attain that object, with a view to a beneficial administration which is keeping down the interest on the incumbrances, and reducing the principal, and which, if allowed to proceed, will result in the end in saving the estate for the owner. In short, a sale may be injurious to all, ruinous to many, and desired by none, of the persons interested in the estate.

Mr. Healy happily described the estates to which he argued that the section must apply as "waterlogged" estates. Before the Master of the Rolls followed up the metaphor, I had thought of doing so, with an apology. As there is no collusion between us in "putting to sea," I shall now boldly say what I

originally purposed. It appears to me that an estate may be temporarily "waterlogged"; it may, like many a vessel that ultimately has come to land in safety, have shipped a sea, and yet may be kept afloat by prudent navigation and by patient care. I cannot find in this section any mandate to scuttle, with all hands, every vessel that is in distress.

Sales to tenants under the Church Act have been mentioned. But there the lands belonged to the Temporalities Commissioners, who were public trustees for sale. No one else had any interest in the lands, or in the proceeds, and the occupying tenants merely got a preference when the public property was converted into money.

This Court is now deciding, I believe unanimously, that the Land Judge ought not—and therefore judicially *must* not—of his own motion, as of course, without hearing anybody, or in spite of anything he can hear, send a request to the Land Commission, which, if once sent, must end in a forced sale, unless the inspection, and hearing, and offer, all prescribed by sect. 40, end in a refusal of the tenants to buy the fee-simple. No means have been suggested, upon Mr. Justice Ross's construction of the section, once the request is sent, of escaping an ultimate sale, except the inadmissible evasion by which the Judge might fix a prohibitive price, under a section which orders him to fix one which he considers "just and reasonable." The difficulties are at once removed, if the Master of the Rolls is right in holding that the sending of the request is in all cases to be governed by judicial discretion. I do not find it necessary to go so far, because I think it will, in practice, be enough—and I hold it in law to be the Judge's duty—to delay or withhold the initial request, in every case in which he would not force a sale under his ordinary jurisdiction. Upon what principle are "special circumstances" to be considered? In what cases may they be held to justify the Judge in the exercise of his discretion in staying his hand? I find the answer in the subject-matter of section 40, and the stage of the proceedings towards a sale at which that section is to take effect. "*Sales in the Landed Estates Court*" are the subject of the legislation, as the marginal note shows. Unless and until *a sale* is about to take place, nothing is to be done under section 40. It has not been reached. The

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duties, powers, and jurisdiction to sell are still, in all cases, conferred and regulated by the Act of 1858, sect. 55. The duty to exercise a judicial discretion as to the *time* of sale remains untouched by the Act of 1896, which never mentions it, and assumes that the time for sale has come when the request is to be sent. Section 40 deals with the *manner* of sale only. The discretion and the procedure, up to the point of bringing the estate "to the hammer," so to speak, are not referred to at all in that section. If it had been intended to alter the law and practice under the unrepealed provisions of the Act of 1858, the Legislature ought to have said so, and if we will only read the Act of 1896, as applying to estates that have come or ought at once to come to *sale*, the two stages of the procedure, and the two functions of the Court, and the interests of all concerned in every estate, can still be governed by the two statutes without conflict. It remains still, in my opinion, as it was before, the duty of the Land Judge to exercise the same judicial discretion on the same materials as before in bringing each estate to the hammer, and in fixing the "times" which he may "think fit" to appoint for his sales. When he gives the opportunity, which we are all now ordering him to give in every case, to the parties interested to bring forward grounds for staying his hand, it will be still his first duty to form a judicial opinion as to each estate, having regard to its circumstances, whether an immediate conversion of the land into money is reasonable and just, having regard to the interests of all parties. He has still, under the Act of 1858, to "think fit" to sell. Whenever he has so determined, but not until then, he must send his request to the Land Commission. Without presuming to dictate to him the details of his practice, or procedure, it would seem plain to me that he never could satisfactorily determine a question having such momentous consequences—namely, whether or not the request should be sent to the Land Commission—without giving the parties interested at least the same opportunity of being heard upon that question, which under the existing practice they have had, and which they still have in the case of all estates not within sect. 40, upon the similar but less important occasion of fixing the time and place and manner of sale under the Act of 1858, sect. 55. Whatever circumstances would, before the Act of 1896, have justified him in delaying a sale,

ought still in my opinion to be regarded as "special" for the purpose of delaying the request, which is the first step to a forced sale. In practice the Judge does not fix the sale until some of the parties move, and I should have thought he might be equally quiescent as to forcing a sale through the agency of a request. It is the duty of the party having the carriage to bring the estate to a sale within a reasonable time, if a sale ought to be had, but not otherwise. If there is any remissness in discharging this duty, the Judge calls on the responsible party to explain the delay. I would even go so far as to say that the order for sale and appointment of a receiver raise a presumption that the sale ought to proceed, and would make it right for the Judge to call more promptly for an explanation of delay. If the case appears not to be proceeding with due diligence, the Judge can and ought to call upon the party responsible "to explain the delay." But whenever and however the case is set down for consideration as to the time of sale, all parties interested must have the opportunity of showing any reasonable ground for allowing the estate to remain under the management of the Court, and for postponing a sale, where it is not the interest, or the desire, of any party to force a sale. The Act of 1896 gives no indication of any intention to *force sales*; it does indicate an intention to *promote purchases*, by seeking buyers in the tenants for estates which otherwise could not be sold for want of bidders. The object of the section is to procure purchasers for what ought to be sold, not to sacrifice what a prudent owner might or could save. I cannot agree that it is the policy of the Land Purchase Acts to sell for the sake of selling; their policy is to induce and enable the tenants to buy the estates which are brought to sale. The supposed policy of "clearing the Court" which Ross, J. and the Chief Justice impute to the Legislature, seems to me to impute a design to sacrifice property to procedure, and at best the suggestion rests on guessing at the object of a statute which says nothing on the subject. The only "glut in the land market" which there is any apparent reason to attempt to remove, is that which is caused by estates which remain unsold for want of buyers. There are very many such for which the tenants are the only potential purchasers, and which offer a useful and ample field for section 40 for years to come. I fail to see any reason for

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imputing a policy to the Legislature of suddenly increasing the glut, by forcing into the market a great number of estates, which would not otherwise be offered for sale at all. The indiscriminate avalanche which Ross, J. held to be caused by the section, in place of relieving the glut in the land market, would only bury the Land Judge and the Land Commission, all at once, under the *indigesta moles* of 750 estates which have been accumulating in Court for nearly twenty years.

In my view the Land Judge should put the section into operation wherever he thinks that the retention of the estate under a receiver is an abuse of the function of his Court, or is not really beneficial, or wherever an ultimate sale appears inevitable, and there is no reasonable prospect of advantage from delay. He may give the parties, even in such cases, a chance of withdrawing the case from Court, or of making some arrangement to avoid a sale, and sect. 40 will give him a useful power of putting pressure upon them for this purpose. In the same view the tenants will be secured the full benefit of pre-emption at a fair judicial price, in the case of every estate which ought to be sold at all, even if Ross, J. goes too far in holding that he cannot now lawfully sell any estate without first offering it to the tenants. The tenants would, upon my construction, get the offer in every case in which a sale ought to be made to anybody, if the Judge has "regard to the interest of all parties interested in the estate." I agree with Ross, J. that these words cannot include the tenants, and the desire or policy of selling to the tenants cannot override them.

The reference in sect. 40 to "other offers," which are to be considered as if in competition with the price at which the estate is to be offered to the tenants, further shows that sect. 40 was not intended to take effect until the stage at which outside bidders can come in, and may actually have come in. The more natural course would be not to receive such offers until they could be accepted, but this cannot be what was intended, for the section says that the Judge is to consider these offers when he is fixing the price at which he is to offer the lands to the tenants. I understand the Master of the Rolls to hold that this shows that outside offers may be accepted without going on to make any offer

to the tenants. If necessary, I should adopt this construction rather than treat the reference to other offers as nugatory. But I think that a fair result may in practice be attained, even on the assumption that no estate within sect. 40 can now be sold to any outsider until an offer has first been made to the occupiers and declined by them. But it certainly does occur to me that, in practice, the opportunity for sending in "other offers" can be much more effectively given before the request is sent to the Land Commission than afterwards. If that opportunity is given at or before the time when the Judge rules upon the notice which this Court is now directing him to give in every case, whether or not the land should be promptly sold, and whether or not the request should be sent to the Land Commission, these offers would be a valuable guide as to whether a sale was immediately necessary, and was likely to be effectual, and they would be far more likely to be real offers, based on value in the open market, than if they were postponed until after the report from the Land Commission had been received. Even though no sale to an outside bidder could be completed until the tenants had first got and declined the offer which the Judge must make to them, outside offers, made provisionally under rules wisely framed, would be available as a guide both to the Judge in fixing the time for sale, and to the Land Commission and the Land Judge in putting a price upon the estate, whereas if put off until after the Land Commission had reported, they probably would not be made at all in competition with the tenants, or if made they would be cut down to a figure suggested by the report of the Land Commission. They must outbid the tenants, unless the Judge can fix his offer at a price less than the highest outside offer, and I do not understand any member of the Court to hold that "regard to the interest of all persons interested in the estate" can be reconciled with a sale at any price below what an outside purchaser is prepared to give.

On the whole, I hold that the Judge is still bound to give all parties an opportunity, *beforehand*, of being heard upon the question whether steps to an immediate sale ought to be taken, and that he is bound, on hearing them, to exercise the same judicial discretion, having due regard to all the circumstances of the estate,

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before he decides that question, which he now exercises in fixing the time of sale. But having decided in the affirmative, he must then set sect. 40 in motion by sending his request, and he cannot afterwards prevent the sale from taking the course prescribed by the section, though he cannot sell to the tenants if a higher price is offered by anyone else.

It is not right now to express any opinion as to what should be done after the request and report, in cases where, through payments off, dropping of incumbered life estates, or other causes, a sale might become unnecessary either as to the whole or as to part of any estate.

As to another class of difficulties discussed in the arguments, I say only that, in my opinion, the section cannot be put into operation at all in any case in which the fee-simple cannot be made available for sale to the tenants under the Land Purchase Acts.

BARRY, L. J. :—

Under ordinary circumstances I would most probably deem it my duty not to occupy time by doing more than expressing my general concurrence in the conclusion arrived at by the Lord Chancellor, the Lord Chief Justice and the Lord Chief Baron, and I believe I may say by anticipation, by Lord Justice Walker, namely, that the provisions of sect. 40, sub-sect. 1, are mandatory. But the interest attached to the case in its novelty, and the variety of views which may necessarily occur to the minds even of those who have formed the same opinion, leads me to offer a very few observations as to my view of the only question which I think is here open for our decision, namely, whether Mr. Justice Ross, according to the rules of legal interpretation of statutes, was right in deciding, to use the words of his order, that he “had no jurisdiction to proceed with the sale by auction so advertised . . . before putting into operation the provisions of sect. 40, sub-sect. 1,” which in other words is simply whether these statutory provisions are mandatory or only directory.

That is the only question, in my opinion, here now for our decision. I confess with all the deference which I always feel

for the opinion of my brother FitzGibbon, that I am unable to follow him in his view that, whilst he holds the sub-section to be mandatory, he still practically leaves to the Judge of the Landed Estates Court the same discretionary powers over the time, place, and manner of sale, which he possessed under the Landed Estates Court Act of 1858. To hold this is in my mind practically to nullify the sub-section of the Act of 1896.

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The suggestion of the Lord Chancellor, which has been adopted by the Court, namely, that before sect. 40 should be put in force, notice should be given to the parties interested, and an opportunity afforded to them to appear and establish that there are special grounds (if such can exist) against the section being put into operation, may present, to some extent at least, a practical compromise between the view of an unlimited discretion under the Act of 1858, which is presented by Lord Justice FitzGibbon, and the very peremptory action adopted, as we are informed, by Mr. Justice Ross. What may be such "special reasons" for declining or postponing to put sect. 40 into operation I do not feel called on or competent to lay down *a priori*, but possibly the inherent control of a Court over its own proceedings may as each case arises supply a solution, but that solution must not, in my opinion, nullify or minimise the mandatory force of the statute as recognised by our decision.

The "policy" and the "intention" of a statute are very often convertible terms, but sometimes they are not. However that may be, we as judges can only consider the policy, so far as it is expressed by the language of the statute, according to the settled rules of legal interpretation.

We have had several suggestions offered here as to the policy of this statute; one was that the intention of the Legislature was to sell estates to the tenants regardless of every other consideration. Support for that theory is said to be found in the Act of Parliament itself, for undoubtedly it does confer great advantages on the tenants, in giving them a certain right of pre-emption; but it is one thing to say that the Act proposes to create a class of purchasers, when none can now be found, by encouraging the tenants to become buyers, and it is another thing to say that such was the only object of the Legislature. Another sug-

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gestion made by counsel was that the intention was to clear away ruthlessly all the estates ripe for sale, and to relieve the Court from what was designated by the counsel for the landlord in this case before us as "the scandal of the present block." There does appear to be foundation for thinking that it was largely in the contemplation of the Legislature to put an end to a state of things which, for better or worse, has undoubtedly existed, and has been for long a subject-matter of comment and criticism by many persons of various ways of thinking; and my idea is, if I were to speculate upon the intention of the Legislature further than what appears on the face of the Act, that the intention was to put an end to a system of allowing cases of absolutely insolvent estates, in which the landlord has no interest, to remain stagnant in the Land Court awaiting sales never to be arrived at, and which are never intended to be arrived at, but the Court is constituted a gigantic agency for the administration of these wholly insolvent estates. I do not mean to condemn universally and unqualifiedly the system of receiverships; I agree that there are cases in which it is not only reasonable, proper, and just that the receiver should continue, and the estate should not be brought to sale. I think the section is open to the criticism that it may work inconvenience and injustice by combining, as it does, in one category estates where there is merely a receiver, and estates that are absolutely insolvent. The two classes of estates are wholly different in their circumstances, and might have received from the Legislature different treatment.

The Master of the Rolls pointed out, with great eloquence and ability, the many instances of hardship and injustice, where the Court of Chancery with most beneficial results calls in aid the Landed Estates Court to appoint a receiver; but unfortunately his judgment was better adapted for the House of Commons on the second reading of the Bill, and I have no doubt that if delivered then and there it would have prevented or obviated many of the mischiefs which his Lordship has so forcibly pointed out. But with all respect for him, the time is past for such criticism, able and eloquent as it was. We are not here to discuss a Bill, but to interpret an Act of Parliament. It does not occur to me that I have any more to do than to simply state the construction

of the statute which I adopt. I rest upon the judgments which the Lord Chief Justice and the Lord Chancellor have pronounced on that point, and am content to say simply that I concur with them.

It is to be observed that the language in the statute is *prima facie* mandatory. "Where an absolute order for the sale of an estate, comprising holdings to which this section applies, has been made under the Landed Estates Court (Ireland) Act, 1858, and either a receiver has been appointed over the estate, or the estate is so circumstanced that it would, independently of this Act, be sold without the consent of the owner as to price, the following provisions shall have effect." I should be slow to rest my judgment on these words "shall have effect," and in the strange phraseology in recent times used in Acts of Parliament many cases could be found, like those referred to by the Master of the Rolls, in which these words mean no more than "Be it enacted." But I cannot hold that in this particular case, having regard to the mandatory character of the provisions which follow, we can cut down those words from their natural sense when they are found to be in association with words which are absolutely mandatory. It goes on to provide:—"The Land Commission shall, at the request of the Land Judge, cause the estate to be inspected." The words "at the request" do not necessarily involve an obligation on the part of the Land Judge to send forward that request; but if we add them to the other words "shall have effect," then, what is to take place? "The Land Commission shall at the request . . . cause the estate to be inspected"; if you stop here, perhaps, it is not sufficiently mandatory. But, then, we go on to sub-section (b), which provides that the Land Judge shall make an offer to the tenants. Take the three clauses together: first, the preliminary clause, then (a) and (b): it is impossible to give any other than a mandatory effect to the language. The language is mandatory—"shall do" so-and-so; the context is sufficiently consistent with it. Why cut it down? I am of opinion that the language is plainly mandatory; and, where there is an order for sale made absolute, and the holdings are of the character described, that the duty is cast upon the Judge of putting into operation this section, subject to any reasons which may be brought before him of a

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“special” character which show sufficient cause why an immediate sale should not be held. But every time that such a rule should be made it is open to an appeal to this Court. The Land Judge is *prima facie* bound to put into operation the provisions of this section, subject to special circumstances (if any) which may induce him, or this Court on appeal, to defer or postpone its operation. What these circumstances may be I cannot *a priori* say. If there are none, then the property must be sold.

I am of opinion that the decision should be affirmed.

WALKER, L.J. :—

As the case under appeal comes before us with the admission of all parties that the estate must be sold, and sold at once, and as in all other respects it fulfils the conditions mentioned in the first clause of section 40, it follows that the order of Judge Ross in this particular case must be affirmed, unless we are prepared to hold either that the Act does not apply at all to an estate which had made such progress as this one towards a sale, which no one asserts, or that in every case the Judge has a discretion to sell as he likes, and to an outsider, passing by the tenants, without making an offer to them.

This is a branch of the larger question whether the Judge has any discretion, and what, as to the withholding of the request or making of the offer, and will more fitly be considered with that question. It is obvious that if we confined our decision to the facts of this case, another will arise in which the opinion of this Court will be asked as to whether the Judge has any discretion, while the absolute order is in operation, and a receiver in possession, to say that he will not go on to a sale, and will leave matters as they are, and make no request or offer. I think, therefore, that we ought to deal with this larger question.

I should like in the first instance to say a few words as to what I consider from the clear language of this Act to be its policy.

The definition clause makes it the last of a series of ten Land Purchase Acts mentioned. The first of these is the Act of 1870,

the 46th section of which received a construction from Judge Flanagan in *Domvile's Estate* (1), which was adopted by the Court of Appeal.

But during the twenty-six years before the 14th August, 1896, eight other Land Purchase Acts had been passed to facilitate tenants purchasing, and during the same interval there had arisen a block in the land market. Sales of land, in the hands of tenants, had proved abortive or impossible, except at prices ruinous to owners or incumbrancers. The Land Court had become incumbered with such cases, one-third of the rental of Ireland had passed into the hands of Court receivers, and, practically, the only buyers were the occupying tenants supplied with money from the State.

Given, therefore, an estate to be sold, and the presence of a Court receiver, or an owner without interest in the estate for sale, there is nothing surprising in the creation of a power which would further a double policy—relieve the land block, and at the same time further the policy of Land Purchase by putting the Land Judge, having charge of the sale of such estates, in immediate privity with the occupying tenants, and putting him in a position to offer them their farms for State money. It is not disputed that it would be reasonable that he might have a discretion to do so. The dispute is whether, the conditions I have mentioned still existing, he must do so, and that is purely a question of the construction of the section, of which I do not presume to be the critic or panegyrist. In ascertaining the construction, regard must be had, upon any matter where the language admits of it, to the pre-existing law. The Land Judge was not merely an auctioneer of lands; he had all the powers of a Judge of a Court of Equity in relation to sales under its procedure, so far as incident to sales and distribution of purchase-money. He was absolute master as to the mode, whether by public sale or private contract, whether in one lot or many, and as to the time he would sell, and the place and manner. Engrafted on this was the duty of giving facilities to occupying tenants to purchase, created by the first of the Acts—a facility shown to be more

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nominal than real in *Domville's Estate* (1) and *Harenc's Estate* (2). He had also a special power to refuse to sell all or any part of the land in case of bad title, even though he was acting under a Court of Chancery decree. But subject to that it was, in my opinion, his duty to carry out an existing judicial decree for sale, and to do so with reasonable expedition.

It is the right of an incumbrancer upon an estate, if there be no personal equity against him, to get his money through a sale. The order for sale ties up all incumbrancers, and they are all entitled to have it put in force. Turning to the Landed Estates Act itself, it contains no warrant for the idea that the Judge can hang up the sale at will, for an indefinite period. I do not think the words that he may sell at such times as he *thinks fit*, are susceptible of such a construction. They mean he may fix the time within the limits of his duty. The 24th section of the Act empowers the Lord Chancellor to call for a return of all proceedings in the Court with their dates, and the rules provide machinery for preventing delay on the part of those who have the carriage. I am aware that Judge Flanagan introduced a practice of declining to sell in any instance in which he did not think the price offered sufficient, and allowing the case to remain in Court undisposed of. I think the practice was contrary to law, and I concur in the view of the policy of the Act taken by Lord Cairns in *Grier's Estate* (3) where he says:—"Beyond all question, the object of the Landed Estates Act was to effect a sale of incumbered estates as soon as possible, and to give to the purchaser an absolute indefeasible title." Further, if such a practice did ever lawfully exist, I think it has been abrogated by the Act of 1896 in the cases where it applies, and I think it does apply whenever the conditions exist, subject to the exercise of the discretion I shall state. If we were to resort to the nautical language which Lord Justice Fitz Gibbon used, I do not think it was intended that the Court should be a dry dock for repairs.

I now come to the construction of the 40th section. Certain conditions must exist before it can be called into operation. There

(1) I. R. 11 Eq. 1, 13. (2) 1 L. R. Ir. 448. (3) L. R. 5 H. L. 709.

must be an absolute order for sale undischarged—a receiver over the estate, or the estate so circumstanced that the owner's consent as to price would not have been asked before a sale. In addition, as the Act is a Land Purchase one, there must be under the jurisdiction of the Judge an estate to which such Acts apply, and further the holdings of the tenants must be agricultural or pastoral, or partly both. The Land Judge must have acquired judicial knowledge that all these conditions exist before the question of request arises. The period required for their ascertainment may largely vary in the case of each estate, and it is quite possible that an argument in Court may, in certain cases, be necessary to determine whether some of them exist. Their existence can be challenged, and no possible injustice can arise under this head. Assuming these conditions satisfied, the section is to “have effect”; and what is its true construction? Can the Judge say:—(1) I am not bound to make an offer to the tenants, even though I sell, and I shall sell in the same manner as I would have done before the Act passed? Or can he say—(2) things are going on very well with a receiver over the estate, and the absolute order hung up, and I shall let matters remain as they are?

I think these cases test the construction. It will facilitate the consideration to always bear in mind that the provisions apply only when a sale is to take place, as if the section ran, “the following provisions shall have effect, and the sale shall take place in the following manner,” and the sale is to take place, not only because the absolute order for sale has said, and says, it shall, but because such sale has not been prevented by application of the ordinary principles on which a Court of Equity acts, and which the Judge is still, I think, free to act on; not, in my opinion, by the 55th section of the Landed Estates Act, but under his inherent powers, viz. by the removal of its necessity and the grounds which put the sale in motion, the discharge of the receiver and absolute order. Several instances have been suggested in which this may happen, and the Judge make a judicial declaration that the sale shall not proceed, and as a consequence order the receiver and absolute order to be discharged. Payment is one; consent of all to discharge the order and receiver is another. A mandatory construction of subdivision (a) does not interfere with this inherent power. Nor do

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I say that special circumstances might not arise, which would justify the Judge in postponing, for a temporary period, the making of the request or offer, if the special needs of the estate called for it; but such discretion to stay his hand could, I think, only be exercised with a due regard to his paramount duty to sell, a duty which binds him to proceed with reasonable speed; and I think a power to deliberately adjudge that matters shall go on without a sale is inconsistent with the words of the section which contemplate the carrying out of a sale when the conditions exist, and with the duty of the Judge to carry out the existing and undischarged order for sale, and the policy of the Act to get rid of the block and facilitate land purchase—a policy, which I think is strengthened by the provisions in (d) making in certain events one-fourth of the tenants compulsory buyers. It would, I think, be impossible to define the cases in which such exceptional circumstances, as I have suggested, would exist; but I have no difficulty in saying that, *prima facie*, the Judge cannot sanction a continued receiver management, or say that a sale shall not take place, because an owner might say he was satisfied with the *status quo*. As to the language of the section itself, it was not contended in argument that (b) is not mandatory in itself, if once brought into existence. There is no ambiguity about the word “shall”; and as the whole substance of the procedure lies in the offer, why should we not find in (b) permissive words, if the argument of the appellants be sound? Nor was it contended in the argument that the whole procedure would not be imperative if (a) followed (b), as it easily might, by a slight change in the language. It only precedes (b), because it prescribes a preliminary step, and the struggle has been to read “at the request,” as if it ran “if requested.” All the inconveniences that have been alluded to are to be found in the working of the admittedly mandatory part, and might furnish reasons for the section being framed “may make an offer,” instead of “shall make.” It would be a strange thing to find the making of the offer mandatory on the Judge, and the furnishing himself with the materials to act discretionary. Then the whole frame of the section points in the same direction—the use of words clearly permissive in other parts of the section, especially sub-section 3. The

words "having regard to the interest of all persons interested in the estate," are only referential to the price, and they are not in (a) but in (b). The argument that there can be a sale, without the making of an offer to the tenants, seems to me to be in conflict with the express words of the section. An "offer to sell" imports pre-emption. If the tenants reject the offer, then the matter is at large, and there is no obligation again to consider one who refuses.

The only obligation imposed is that the tenants shall have the opportunity of being the first bidders at a price judicially determined to be just to every interest that exists in the estate, and that the price will not be determined till full opportunity has been given for considering every topic that can influence the Judge in fixing it. There cannot be more care exhibited than there is in this section to guard against the price being, as a whole for the estate, or separately for any one tenant, inadequate.

The argument really comes to this, that the elements for determining the price are such uncertain guides that there should be a discretion in the Judge over the whole subject, including the mode of sale, and making of the request; but where is that in the section? As to offers to purchase—they will be very relevant to the question of fixing the price, and will affect the tenant's right of pre-emption as regards that price, and I cannot agree that a *bona fide* and binding offer (for it must be that) to give a certain named sum for a lot, should the opportunity for the buying arise, will turn out to be illusory or futile. Every incumbrancer will have an interest to protect the money due to him, at least up to its amount. The difficulties suggested will arise whenever the section comes to be applied, and might furnish ground for never applying it, and are some of them strong arguments on one side of the question whether the section should have been enacted at all. A case has been suggested of a combination amongst the tenants not to buy, and it is asked whether then the Judge would be bound to make the offer? I answer that, in my opinion, he would, unless perhaps the evidence was equivalent to proof of a refusal to buy in any event. We were also pressed with the cases of estates quite solvent, with a receiver during a minority, to protect the minor's estate; such cases will

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more readily present the exceptional features, which may justify a stay on action under the section. What those exceptional circumstances may in all cases be, it is impossible to forecast, but I have no difficulty in stating my opinion as to what is *prima facie* the paramount duty of the Land Judge, when the conditions mentioned in the 40th section exist. I think the appeal of the owners must be dismissed. I agree that the course suggested by the Lord Chancellor, to be followed by the Judge before a request is made, will be convenient. Our judgments indicate the topics which alone will be open for the consideration of the Judge.

Solicitors for the appellants: *Baker and Ringwood.*

Solicitor for the respondents: *Buggy.*

R. D. M.

IN THE MATTER OF THE ESTATE OF THE TRUSTEES OF
R. OWEN (No. 2) (1). *Appeal.*
1896.

Dec. 16, 17.

Tenants holding under Court lettings—Purchase of holdings—Land Law (Ireland) Act, 1896, sect. 40, sub-sections 1, 2.

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Tenants holding under lettings from the Land Judge or Receiver Judge are within the provisions of the 40th section of the Land Law (Ireland) Act, 1896, sub-sect. 1.

Decision of Ross, J., *ante*, p. 196, reversed.

APPEAL from so much of the order of Ross, J., dated the 23rd November, 1896, as declared that the tenants of Lots 1, 2, 3, 5, 6, 7, and 11, being tenants in occupation of their holdings under lettings made by the Land Judge or Receiver Judge, were not within the provisions sect. 40, sub-section 1 of the Land Act, 1896, and directed that the solicitors, having carriage, should be at liberty to advertise the sale of the said lots by public auction.

Cherry, Q.C., and *T. M. Healy*, for the appellants:—

Sub-section 2 of sect. 40 was passed to meet the doubt expressed in *Lawrence's Estate* (2); the latter part of the sub-section brings them within sub-sect. 1 of sect. 40. Sub-sect. 2 is not an independent enactment; if it had been, it would have been put in a clause by itself, and not in the middle of sect. 40. Moreover, the concluding words of sub-section 3 show that sub-section 2 would, *prima facie*, apply to sub-section 1. Persons under Court lettings were always entitled to the ordinary rights of tenants; to emble-

(1) Before LORD ASHBOURNE, C., SIR PETER O'BRIEN, L.C.J., PALLES, C.B., and FITZGIBBON, BARRY, and WALKER, L.JJ.

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ments, *Creed v. Creed* (1), *Hyde v. Roche* (2); to compensation for improvements, *Ward v. Walker* (3). But they were excluded from the Land Acts, as being tenants for temporary convenience: *Callan v. Dowdall* (4); *Croker v. Clanchy* (5). The relation of landlord and tenant depends upon contract, not upon tenure. Upon the passing of this Act the Court tenants became tenants of holdings. Even if this sub-section 2 were in another Act, the Court tenants would come within sub-section 1.

Campbell, Q.C., Meredith, Q.C., and Brady, for the owners:—

Section 40 consists of three parts—Part I. consists of (a) to (g); Part II. relates to the power given to Court tenants; and Part III. to the power given to a solvent owner. The object of Part II. was to give to Court tenants a right to agree to purchase which they did not possess before. A tenant must hold under a contract of tenancy not less than a yearly tenancy to be within the Purchase Acts by sect. 26 of the Act of 1885. But residential holdings were within the Purchase Acts. The “request” does not apply to Court tenants. Sub-section 2 is an isolated clause. “May agree” does not apply to the tenants in sub-section 1; and there can be no receiver under the circumstances prescribed in sub-section 3. Court tenants can only exist where there is a receiver. The sub-section was merely enacted to meet the decision in *Lawrence's Estate* (6); it is a voluntary purchase section.

Barton, Q.C., for the incumbrancers.

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LORD ASHBOURNE, C.:—

The question raised by this appeal is—Are tenants under Court lettings within the terms of sub-sect. 1 of section 40? It was alleged in the argument addressed to us, that sub-sect. 2 was

(1) 3 Ir. Eq. R. 207.

(2) 5 Ir. C. L. R. 195.

(3) 6 Ir. L. T. R. 155.

(4) MacD. 311.

(5) 20 L. R. Ir. 111.

(6) [1896] 2 Ir. R. 347.

framed not with a view to the general policy of section 40, or in connection with anything preceding or following, but for an isolated and separate purpose; and that purpose is to be found in the decision of this Court in *Lawrence's Estate* (1), which suggested the question whether tenants under Court lettings were within the Land Purchase Acts, and it was urged that the Legislature settled that question alone by this sub-section, by providing that they should come within the land code. It was urged that that was the one and only purpose for which the sub-section was passed, and that we should not go outside that. In order to strengthen that argument, the words "may agree" in this section were fastened upon, and it was sought to be deduced from those words that these tenants were not within sub-sect. 1, and not within the scope and operation of the earlier portion of the clause, and that these words referred to a voluntary procedure outside the Act of 1896 altogether. It was also urged, in further support of the argument, that sub-clause (g) showed that the section was limited to holdings, agricultural and pastoral, or partly agricultural and partly pastoral, and that that was still another reason to limit the construction of sub-section 2. But we must take a much wider view of this sub-section; and when it is found in the very centre of clause 40, when it is found between clauses 1, 3 and 4, which admittedly deal with the same subject-matter, there should, indeed, be some very strong reason to show that this particular sub-section had nothing to say to what went before or what came after, and that it was an isolated enactment, standing by itself, to meet a particular grievance, and was entirely divorced from the matter that was sought to be legislated for in the rest of the section. I find in the section apt words to describe the parcel of land held by a tenant, under a Court letting, as a holding, within the Land Purchase Acts; it enacts that "the same shall be deemed a holding, such person a tenant, and the Land Judge or Receiver Judge, as the case may be, a landlord, within the meaning of the Land Purchase Acts." I am at a loss to see that, because in the middle of the section the words "may agree" occur, this particular sub-section is excluded from the rest of the code. It may well be that

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other words might have been used to work out the same result; but we have to see are the words apt and sufficient to carry out the purpose? I am of opinion that they are; and that, therefore, in this case the appeal should be allowed. We shall return the case to the Land Judge, with the declaration that the tenants under Court lettings are within section 40 of the Land Law Act.

The Lord Chief Justice, who was present during the argument of this appeal, and who is now unavoidably absent, has intimated to me that he agrees in the conclusion at which I have arrived.

PALLES, C. B.:—

The question upon this, the second appeal, is whether a person in occupation of a parcel of land, which is partly agricultural and partly pastoral, and which is held under a letting by the Land Judge or Receiver Judge, is entitled to the benefit of sub-sect. 1 of the 40th section. I agree with the Lord Chancellor that, upon the true construction of that sub-section, he is so entitled.

The genesis of this sub-section appears to me to be found in the judgment of the Lord Chief Justice and Lord Justice Fitz-Gibbon, in *Lawrence's Estate* (1). In his judgment in that case, the Chief Justice expressed a doubt, which in my opinion was thoroughly well founded, whether such a person was a "tenant" within the meaning of the Land Purchase Acts, which were then in force. Lord Justice Fitz-Gibbon did not go so far, but he pointed out that, in order to constitute a "holding," it was necessary that there should be a tenant and landlord, and he held that, in the case then before the Court, in which the person to whom the Judge had let, was the owner of the land, there was neither "tenant" nor "landlord" within the meaning of the Land Purchase Acts, and therefore that there was no valid "agreement" within the meaning of those Acts. The reason, therefore, for excluding the claimant there from the benefit of the Land Purchase Acts was because, upon the true construction of those Acts, such a person was not competent to agree to purchase such a parcel of land. This reason was founded upon three propositions,

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viz.: (a) because the parcel of land in question was not a "holding"; (b) because such a person was not a "tenant"; and (c) because the Judge was not a "landlord," within the meaning of the Land Purchase Acts.

Now, it will be found that the sub-section in question takes up: first, the concrete reason, and then the three separate propositions, or elements, upon which that reason was grounded; and it negatives the application of such reasoning to the code of Land Purchase Acts as they now exist, by enacting in terms the contradictory of the reason itself, and of each of the elements which constituted it:—(1) the person who, it was held, was not competent to agree to purchase, in the words of the sub-section, "may agree to purchase"; (2) the parcel of land, which was held not to be a holding, "shall be deemed a holding"; (3) the person who was held not to be a tenant, is to be deemed "a tenant"; and (4) the Judge "a landlord," within the meaning of the Land Purchase Acts. But section 40, sub-section 1, being in part III. of the Act, is to be construed as one with the Land Purchase Acts, and therefore any person within sub-section 2 must be a "tenant" within the meaning of sub-sect. 1, unless expressly excluded by some of the provisions of that sub-section; but the only excluding provision applicable to the question in hand is clause (g)—that the foregoing provisions of the section shall apply to holdings which are agricultural or pastoral, or partly agricultural and partly pastoral; and therefore, where the *quasi* holding is of this character, the person in occupation of and paying rent for it is a "tenant," within the meaning of sub-sect. 1.

FITZ GIBBON, L.J. :—

I concur. I can best express my opinion, by quoting from the judgment of Ross, J., the two opposite views which were presented before him. The first, which he did not adopt, he states in his judgment thus: "It has been contended on their" (the appellants) "behalf that under sect. 40 they are in exactly the same position as the ordinary tenant—that I am obliged to include the lands held by them in my request, and that they are entitled to have the offer made to them to sell the fee-simple. It is pressed on their behalf that they must be included in the class mentioned in sub-

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sect. (b) of section 40 namely—"persons appearing to be in occupation as tenants of such holding." The respondents' view, which he adopted, he states in these words—"On the other hand it has been contended that they are not in occupation as tenants of holdings at all—that they are merely in occupation of a parcel of land—not the same thing as a holding." Time out of mind we have called attention to the fact that these Land Acts, in many instances, expressly direct that people shall be deemed to be what they are not. When Ross, J. stated that the appellants were "merely in occupation of a parcel of land, not the same thing as a holding," he brought them within the very words of sub-sect. 2, which provides that "any person in occupation of, and paying rent for, a parcel of land . . . held under a letting by the Land Judge, or Receiver Judge, may agree to purchase such parcel of land, and *the same shall be deemed a holding, and such person a tenant.*" Is it possible to deny any of the benefits of section 40 to a person who is deemed to be a tenant of what is deemed to be a holding within the Land Acts? In my opinion sect. 40 cannot be divided, so as to make part of it applicable, and part of it inapplicable, to the appellants and their holdings. Sub-sect. 1 begins by providing that where an absolute order for sale of an estate comprising *holdings to which this section applies* has been made, then in certain contingencies "*the following provisions shall have effect.*" The closing words of sub-sect. 4 provide that "Rules . . . may be made for carrying into effect *this section.*" Sub-clause (g) of sub-sect. 2 provides that the *foregoing provisions of this section* shall apply only to holdings which are agricultural or pastoral, or partly agricultural and partly pastoral. The same expression—"the foregoing provisions of this section"—is also used in sub-sect. 3, and thus section 40 is in terms identified as a single section, and the appellants' rights under it cannot be confined to any one part of it, if they are once deemed to be within it.

There are many other difficulties and questions, apparent upon the section, which must be reserved for consideration until they arise. For the present, it is enough to say that it is one and entire, and that the appellants, being deemed to be tenants, must get the benefit of all the provisions which would apply to them if they really were tenants. The only words which suggest

any other construction are the enabling words—"may agree to purchase"; but, as the Chief Baron has pointed out, these words were introduced to get rid of the difficulty which arose in consequence of the decision in *Lawrence's Estate* (1). It was there held that the owner of an estate could not, under the Land Purchase Acts, agree to purchase a portion of his own lands. This sub-section enables him to do so, and also enacts that he shall be deemed to be a tenant on his own estate.

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BARRY, L. J., concurred.

WALKER, L. J.:—

On the second appeal I agree for the reasons already assigned, that the order of Judge Ross cannot be sustained. I think that all Court tenants who are within (*g*) can not only agree to purchase their holdings, but are also within the provisions of the first sub-section.

I express no opinion as to other questions that may arise on the construction of the 2nd and 3rd sub-sections as to the position of an owner.

Solicitor for the appellants: *J. H. Menton*.

Solicitors for the respondents: *Baker & Ringwood*.

Solicitors for the incumbrancers: *Horan & Shortt*.

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June 12, 13,
18, 30.

HILL v. THE GUARDIANS OF CLONMEL UNION.

(1896. No. 153.)

Guardians of the poor—Building of workhouse—Statutory power—Payment of loan—Limitation of time—Power to charge rates generally—Laches—Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), ss. 35, 61–66, 89, 90.

The Act 1 & 2 Vict. c. 56, which provides that money borrowed from a private person on the security of rates and for the purposes as therein provided, shall be repaid by annual instalments of not less than one-twentieth of the sum borrowed, the first of such instalments to be paid at the expiration of one year from the date of the loan on the happening of the conditions mentioned, does not extinguish the debt in a case where there has been no instalment of the principal money paid within the twenty years.

The general principle as regards such borrowing statutes is that where there is a statutory power of charging existing and future rates, a direction to pay within a fixed period, or by certain instalments, is directory only and not mandatory; but that when the only charge is upon a rate to be specially made for the purpose, or upon the rates for certain years only, the statutory provision must be strictly followed, otherwise the debt will be lost.

In 1851 Guardians of the Poor borrowed money from A B for purposes connected with the building of a workhouse, and by deed executed in that year created a charge for the sum borrowed on the future poor rate, and it provided that this principal sum should be repaid by equal annual instalments within twenty years, the first instalment with interest to be paid at the expiration of one year from the date of the deed. The deed of charge provided for interest at the rate of 6 per cent., to be reduced to 5 per cent. on punctual payment. In 1872 A B who had advanced the money as trustee for the plaintiffs assigned to them. The Guardians never paid any instalment of the principal money mentioned in the deed, but paid interest up to the 26th June, 1895. Since that date they declined to pay either principal money or interest, except under judgment of the Court:—

Held, that the non-receipt of any instalment of the principal money, both parties believing it might be held over, did not constitute *laches* on the part of the plaintiffs, and that the sum borrowed and secured by the indenture of charge should be declared well charged on the rates, and that a *mandamus* should issue directing the Guardians to raise the principal sum and interest, and if necessary, to strike a rate to pay the same.

TRIAL OF ACTION.

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By indenture dated 26th July, 1851, and made between the Guardians of the Poor of the Clonmel Union of the one part, and Thomas Hughes of the other part, it was recited that by an order dated 18th March, 1839, the Poor Law Commissioners did order and declare that certain townlands in the schedule thereof named should be united for the relief of the destitute poor by the name of the Clonmel Union, and it was further recited that one work-house was ascertained not to be sufficient for said Union, and that by an order of the Poor Law Commissioners, dated 11th March, 1851, setting out that it was expedient that a further sum of £10,000 should be expended, it was ordered that the Guardians should borrow the said sum pursuant to the provisions of 1 & 2 Vict. c. 56, and the Acts amending same, and should charge the same, together with all interest that might accrue thereon, on the future poor-rate of the said Union. The indenture, after reciting that Thomas Hughes had agreed to lend £1000, part of the said sum of £10,000, witnessed (after acknowledging the receipt of said sum) that the said Guardians in pursuance of 1 & 2 Vict. c. 56, and the Acts amending the same, and in pursuance of the order of 11th March, 1851, and of every other power enabling them in that behalf, did thereby subject and charge all and every the rates which should or might at any time or times thereafter be raised or otherwise become payable for the relief of the destitute poor of the Clonmel Union, with the payment unto the said Thomas Hughes, and to his executors, administrators, and assigns, of the said sum of £1000, by twenty equal annual payments or instalments of £50 each, the first of same, together with interest, at the rate thereafter mentioned, upon the entire sum of £1000, to be paid at the expiration of one year from the date thereof, and the second and every succeeding instalment, with the interest then due on the residue of the sum of £1000 then remaining due and unpaid, to be paid at the expiration of one year from the time therein appointed for payment of the next preceding instalment, until the whole of said principal sum of £1000, and interest should be repaid. The indenture provided for interest at the rate of 6 per cent. per annum, to be reduced to 5 per cent. on punctual payment as therein mentioned. The indenture contained a power

M. R. for the Guardians to pay off said sum at an earlier date on giving
 1896. the notices therein mentioned.

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 CLONMEL mentioned in the deed, but satisfied the interest on foot thereof up
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On 30th April, 1872, Thomas Hughes, who had originally advanced the sum of £1000 as a trustee for the plaintiffs, assigned all his interest in same under the deed to them, and since that date till 26th June, 1895, the plaintiffs received the interest, having duly given notice of the assignment to the defendants.

In 1895 the Guardians raised a question as to their liability to repay the principal sum of £1000, or any portion of their loan, on the ground that same was payable by instalments and the time for payment thereof had long since passed. Since that date they declined to pay either principal or interest, save under the judgment of the Court.

The plaintiffs claimed to have it declared that the sum of £1000, and such interest as should be found due thereon, secured by the deed of 26th July, 1851, was well charged on the rates leviable for the relief of the poor of the Clonmel Union. They also claimed a mandamus directed to the defendants to pay the debt of £1000 and interest thereon, and if necessary to strike a sufficient rate to pay the same. They also claimed what was due for principal and interest, and judgment for the sum so found to be due.

By their statement of defence the defendants stated that the entire sum of £10,000 mentioned in the order of 11th March, 1851, was borrowed as provided by the statute 1 & 2 Vict. c. 56. They also stated that £1820, part of the £10,000 had been repaid, and that the period for raising the balance by instalments had long since elapsed. They alleged that they had now no power of raising and paying any part of the loans by instalments, the statutable period for doing so having elapsed, and that the chargeants, being in receipt of a large interest on the loans, neglected to call in any part of same during the period prescribed by the statute.

Paragraphs 4 and 5 of the statement of defence were as follows:—(4) The present ratepayers object to the burden of said

loans being cast on them, and the defendants submit to the judgment of the Court whether the statutory power of the defendants to raise a rate for the payment of said principal sum of £1000 and interest has not expired. (5) The defendants further submit that the plaintiffs, in the events which have happened, and having regard to the period which has elapsed and the *laches* of the said plaintiffs, are not entitled to the relief sought for.

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Piers White, Q.C. (with him *Ronan, Q.C.*, and *Henry, Q.C.*),
for the plaintiffs:—

The legal question raised by the pleadings is whether the Poor Law Guardians are justified in repudiating liability on the security held by the plaintiffs. We submit they are not. The defence rests on a misunderstanding of *The Queen v. The Churchwardens of All Saints, Wigan* (1). In that case there was no general charge upon the rates. As to the general principle applicable see *Rex v. Carpenter* (2); *Reg. v. St. Michael's, Southampton* (3). And in *Reg. v. Hurstbourne Tarrant* (4) it was decided that a charge under 6 & 7 Wm. 4, c. 96, s. 3, being a charge on the rates generally, might be enforced against the rates at a time subsequent to that specified for the repayment of the loan. These three cases are authorities in favour of our contention that the debt is not extinguished. *The Queen v. The Churchwardens of All Saints, Wigan* (1), was decided altogether on the construction of the particular Act of Parliament. It does not question the decisions previously referred to. Lord O'Hagan says (p. 630):—"In all cases of construction like this the specific terms of each statute must be carefully considered, and those authorities will be found to apply to Acts quite distinguishable from those before us." And see the observations of Lord Hatherley (p. 626). The words in that statute were clearly prohibitive. "At farthest" is a very strong expression. But on the construction of this statutory power the provision as to the repayment of the loan within twenty years is merely directory, and the fact that this has not been done does not release the Guardians from liability. They have power to charge the rates existing and

(1) 1 App. Cas. 611.

(3) 6 E. & B. 807.

(2) 6 A. & E. 794.

(4) E. B. & E. 246.

M. R. future, and their power to strike a rate for the repayment of the
 1896. loan is not limited to twenty years.

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Right Hon. The MacDermot, Q.C., Meredith, Q.C., and Moriarty,
 for the defendants:—

The borrowing power of the Guardians has been exhausted, and they have now no power to pay this debt. They have no power to strike a rate for this purpose. Their power to do so was limited under the statute to twenty years, and the statutory power must be exercised in accordance with the provisions of the Act. The provision as to the repayment of the principal money—"shall be repaid by annual instalments of not less than one-twentieth of the sum borrowed"—is clearly mandatory.

In *The King v. Carpenter* (1), under 43 Geo. 3, c. 110, the words were "shall pay off or provide for" a twentieth part of any moneys borrowed, and there is a provision in the previous Act, which gives borrowing powers, that the charge is to continue on the rates till the money is paid. And the reason of the decision may be found in the fact that the loan appears to have been made before 43 Geo. 3, c. 110, came into force, and it would consequently have been unjust to alter the rights of the parties by legislation subsequent to the borrowing. In *Reg. v. St Michael's, Southampton* (2), there were in the statute in question no such mandatory words as those used in the Act under which the present borrowing power was exercised. Similarly *The Queen v. Hurstbourne Tarrant* (3) is distinguishable. But *The Queen v. The Churchwardens of All Saints, Wigan* (4), is a decisive authority in favour of our contention. The decision would have been the same even if the words "at farthest" were omitted. They are mere surplusage, and do not add any enacting force to the proviso as to repayment. It is clear from the Act now under consideration that the lender was bound to know that twenty years is the whole period allowed for repayment of his debt, and the statutory bargain must be held to be binding on both parties.

The present ratepayers cannot beonerated with the charge

(1) 6 A. & E. 794.

(2) 6 E. & B. 807.

(3) E. B. & E. 246.

(4) 1 App. Cas. 611.

unless the Legislature has authorised this to be done under the statutable power, for the Guardians have no power at Common Law to borrow or strike a rate for this purpose: *The King v. Wavell* (1). Future ratepayers are to be protected from liabilities for debts already incurred by their predecessors. See the English Poor Law Act of 1859; *Midland Railway Co. v. Edmonton Union* (2). At Common Law a retrospective rate was, as a rule, bad; and a retrospective rate will not be allowed unless the Act of Parliament renders the Common Law rule inapplicable: *Rex v. Churchwardens of Dursley* (3). In this case the deed goes beyond the statutory power, and so far as it does is *ultra vires*. As to what is mandatory and what directory only, see *Frend v. Dennett* (4).

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The plaintiffs are disentitled owing to *laches*. Lapse of time and want of diligence on the part of the creditor will prevent the Court interfering in his favour: *King v. Justices of Lancashire* (5).

Ronan, Q. C., in reply:—

There is nothing *ultra vires* in the deed of 1851; it is in accordance with the statutory power, the construction of which is plain. Nothing short of express enactment can destroy a vested debt. There is here no express provision prohibiting the Guardians lending on other terms than those mentioned, but they have a power of charging the rates generally, and that being so the case falls within the principle of the three cases relied on by Mr. White. These cases are not affected by the decision of *The Queen v. The Churchwardens of All Saints, Wigan* (6); and there was nothing suggested in the House of Lords as showing any disapproval of them. They were considered and not dissented from. Lord O'Hagan refers to each of them in his judgment; and Lord Hatherley says, "The case is clear of all the authorities which have been cited."

As to the question of *laches*, the effect of the decisions is that the provisions of one of these borrowing statutes do not impose

(1) 1 Doug. 116.

(2) [1895] A. C. 485.

(3) 5 A. & E. 10.

(4) 4 C. B. (N. S.) 576.

(5) 12 East, 366.

(6) 1 App. Cas. 611.

M. R. a duty on the creditor of seeing that his debt is repaid within the
 1896. time specified.

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June 30.

THE MASTER OF THE ROLLS (after stating the pleadings)
 said:—

That is the record—a very short and simple one. The case raises two questions only: first, whether the period of twenty years mentioned in the deed of 1851, for the repayment of the £1000 having elapsed, the rates can now be applied or a special rate struck for the purpose of meeting a liability which it was contemplated should be discharged by twenty yearly payments of £50; and second, whether the plaintiffs are debarred from the relief they claim owing to *laches* on their part.

The first question depends on the statutory power authorising the guardians to raise a loan, and secondly on the terms of the deed of 1851, and the consideration of how far it correctly carries out the power which the guardians had under the Act of Parliament of borrowing money. There are three material sections of the Poor Law (Ireland) Act, 1838 (1 & 2 Vict. c. 56). They are the 35th, the 89th, and the 90th sections. The 35th section enacts that the “Commissioners may from time to time as they may see fit, build or cause to be built a workhouse or workhouses for any union not having a workhouse, or purchase or hire land of any tenure for the purpose of building the same thereon, and may purchase or hire a workhouse or workhouses, or any building or buildings, for the purpose of being used as or converted into a workhouse or workhouses, &c., and may build, hire, or purchase any additional workhouse or workhouses, or any building or buildings, for the purpose of being used as or converted into a workhouse or workhouses, and may purchase or hire any land for building such additional workhouse or workhouses thereon, of such size and description, and according to such plan, and in such manner as the Commissioners shall deem most proper for carrying this Act into execution . . . and the guardians of every union are hereby authorized and required to assess, raise and levy such sum or sums of money for the purposes hereinbefore specified, as the Commissioners shall from time to time direct, as a poor-rate, in the manner hereinafter provided, or to borrow money for such

purposes, under the provisions of this Act, *and to charge the same with interest on the future poor rate* of such union; and all lands and buildings so purchased or hired shall be conveyed or taken to the Commissioners for the time being, and shall vest in the succeeding Commissioners in perpetual succession, in the same manner as hereinbefore provided concerning workhouses in unions at the time of the declaration thereof."

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Now that section refers to the manner of the assessment and raising of the loan as "hereinafter provided," and we consequently have to consider the following sections. Coming to the 89th, which is a borrowing section, it provides "That whenever it is made lawful under the provisions of this Act *to charge or secure money on the rates* of any union or electoral division, it shall be lawful for the guardians of such union, with the consent of the Commissioners, to be testified . . .," and so forth "to borrow and obtain such money from any person willing to advance the same *on the security of such rates* on the terms hereinafter mentioned, or to make application for an advance of any sum necessary for any such purposes to the Commissioners appointed under an Act passed in the 57th year of His Majesty King George the Third . . . and of any Act or Acts passed for amending or continuing the same, and the said Exchequer Bill Loan Commissioners are hereby empowered to make such advances upon any such application as aforesaid, upon the security of the rates for the relief of the poor, or special rates under this Act, to be made in such union or electoral division, and without requiring any further or other security than a charge on such rates: Provided always, that no such advance of money shall be made by the Exchequer Bill Loan Commissioners for the purpose of building any workhouse, unless with the consent of the Commissioners of Her Majesty's Treasury." There are two modes provided in that section of borrowing money, one from the Commissioners of Public Works in the mode authorized by 57 Geo. 3, c. 34, and which would enable the repayment of the loan to be extended over a period much longer than twenty years. (During the argument I read the sections.) The other mode provided is borrowing from a private person on the security of the rates "on the terms hereinafter mentioned," which is the

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present case. And then section 90 provides: "That all money to be borrowed under the provisions of this Act shall be secured by a charge on *the rates hereby authorized*" (see sect. 61, *et seqq.*), "under the seal of the guardians or other persons appointed or authorized to act as guardians, or under the seal of the Commissioners, as the case shall require, and shall carry interest after such rate as may in such charge be mentioned; and in the case of money borrowed for the purchase of land or any interest therein for building or enlarging a workhouse, or furnishing and fitting up the same . . . the principal money shall be repaid by annual instalments of not less than one-twentieth of the sum borrowed; the first of such instalments to be paid at or before the expiration of one year after the time of the advance of such money, if at the time of such advance any workhouse in the union shall have been declared by the Commissioners fit for the reception of destitute poor, and if no workhouse in the union shall have been so declared fit, then at or before the expiration of one year after the time when some workhouse shall have been so declared fit, and in every case not otherwise provided for by this Act such principal money shall be repaid by such instalments as in the charges by which the same shall be secured shall, with the consent of the Commissioners, be specified in that behalf."

That is the statutory power under which the loan was created and the deed executed between the parties. The deed was apparently prepared with great care. After reciting preliminary matter which I have referred to, and reciting that it had been ascertained that one workhouse was not sufficient for the purposes of the Clonmel Union, and that the Commissioners by order under seal had authorised that a further sum of £10,000 should be expended in the said union for the purpose of building the additional workhouse, and for the purpose of defraying the said expense the said Commissioners "did further order and direct the guardians of the said union to assess, raise, and levy the said sum of £10,000 as a poor-rate in the manner provided by the said Act, or to borrow the said sum according to the provisions of the said Act, and to charge the same, together with all interest that might accrue thereon on the future poor rate of the said union." It then purports, in the operative part, in consideration of £1000

paid by Thomas Hughes to “subject and charge *all and every the rates which shall or may at any time or times hereafter be raised*, or otherwise become payable for the relief of the destitute poor of the said union called the Clonmel Union, with the payment unto the said Thomas Hughes, and to his executors, administrators, and assigns, of the said sum of £1000 to be paid by twenty equal annual payments or instalments of £50 each in the manner after mentioned,” and so forth. And there is a proviso that the interest payable at the rate of 6 per cent. should be reduced to 5 per cent. on the punctual payment of the instalments on the 26th of December and 26th of June in each year.

On the face of the deed it looks so like being in exact conformity with the statutory power that The Mac Dermot in argument said it was in exact conformity with it. However, he is not bound by that admission, and subsequently he submitted that it differed from the statutory power, and was *ultra vires* in some not immaterial particulars. If the deed can be justified under the Act there is little to argue.

The present differs from the ordinary case of a loan between private persons who are at liberty to contract in any way they please, or of a loan between public bodies, not under any statutory obligation as to mode or time of charge or repayment; and in that point of view the case must be considered. No matter how it is decided it involves some hardship. In the first place, if the plaintiff is right in his contention, he is at liberty to come down for the entire amount, both principal and interest, upon the present body of ratepayers who never contracted the loan; and it is obvious that the ratepayers in 1896 are a different body from the ratepayers in 1851 or even those in 1871; and it is a hardship on them to have to pay the whole amount now due at once. And it would be just as hard on the plaintiff to lose his £1000 as it would be upon the ratepayers to provide in one sum the whole advance of £1000 which they could not have supposed they should be called on to pay off at a greater rate than £50 a-year. It must be conceded that there is considerable hardship in any view of the case. However, the matter must be decided as one of mere legal right.

On the main question a number of decisions have been referred

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to, but there are only three which I think it necessary to consider as having any bearing on the subject; for *The King v. The Churchwardens of Dursley* (1) only decided that a loan under the Acts in question cannot be contracted after the execution of repairs, but should be made beforehand; and *The King v. St. Michael's, Pembroke* (2) did not decide any question directly bearing on the point. But there are three cases which appear to have an intimate and important bearing on the present. The first is *The King v. Carpenter* (3). That case arose under the English Poor Law Acts; and Sir J. Campbell, the Attorney-General, in arguing, says: "By stat. 22 Geo. 3, c. 83, sect. 20, the visitor and guardian may borrow, under such circumstances as the present, and secure the money by a charge on the poor-rates; and the charge is to continue on the rates, and the assessments to remain unaltered, till the money borrowed, and interest, be paid; and the interest is to be kept down. So far there is no limitation as to time. Then, by stat. 42 Geo. 3, c. 74, the guardians with the consent of the creditor might pay off not less than one-twentieth part of the principal annually, besides the interest." Then he refers to 43 Geo. 3, c. 110, s. 2, which enacts "that such assessments shall and may from time to time be diminished to such amount as shall be deemed proper and necessary: provided always, that the guardians of the poor, for the time being, of every such parish shall" (not may as it was in the year before) "yearly and every year pay off or provide for a twentieth part at least of any moneys which shall have been borrowed for the purpose aforesaid, under the powers of the said Act (4), and also shall duly keep down the interest of all moneys which shall be so borrowed; anything in the said recited Acts (5) or either of them to the contrary notwithstanding." In the consideration of this case The MacDermot attempted to distinguish it from that before me. In both, no doubt, there was a charge created which purported to be a charge on all future rates; but though there was a provision in *Carpenter's Case* (3) making it compulsory, The MacDermot suggested that the reason of the decision was that it would have been unjust to alter the position of the borrower by legislation subsequent to the

(1) 5 A. & E. 10.

(2) *Ibid.* 603.

(3) 6 A. & E. 794.

(4) 22 Geo. 3, c. 83.

(5) 22 Geo. 3, c. 83; 42 Geo. 3, c. 74.

borrowing; and that argument would be of great force if the fact were so; that is, if the loan had been made before 43 Geo. 3. But as a matter of fact the statute was prior to the loan, and in force at its date; because I find that the bonds on which the advances were made were dated March 21st, 1807, and the statute was passed in 1803. All these statutes were therefore in force and *in pari materia*, and the bonds were made four years after the last of them. It is, therefore, exactly as if there was only one statute containing all the provisions. In giving judgment Lord Denman says: "Under this last statute it is contended that the parties holding the bonds can no longer recover; that is, that the debt is extinguished; for, unless this remedy lie, it is impossible to contend that any does. I am of opinion, clearly and without doubt, that such is not the effect of the statute; and that the charge still continues. The proviso does not protect the parish from the charge incurred by it and made perpetual. Perhaps it might be the duty of both parties to see that the one-twentieth was paid every year; but I cannot but feel certain that if the Legislature intended the creditor's claim to be put an end to, unless it was pressed from time to time, such an intention would not have been left to inference." Littledale, J., says: "The second section of stat. 43 Geo. 3, c. 110, directs the parish to pay, but does not make it the business of the lender to look after the guardians. He is not bound to apply for a mandamus. The charge on the rates continues; and as there is no power to make a rate as here prayed, the creditor is entitled to enforce his right by a mandamus for payment." And Patteson, J.: "Then stat. 43 Geo. 3, c. 110, repeals the enactment of stat. 22 Geo. 3, c. 83, sect. 20, that the assessments shall continue at the same rate, but requires that a twentieth part of the moneys borrowed shall be paid off or provided for annually. But it does not say that each creditor is to receive one-twentieth; only that one-twentieth of the whole sum borrowed shall be paid or provided for. Still there is a difficulty as to the mode of satisfying a creditor; and, I think, the proper mode of framing the rule will be that suggested by the Lord Chief Justice."

That case cannot be distinguished on the ground put by The Mac Dermot, and if it stood unaffected and unreversed would be

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M. R. an authority in favour of the plaintiff. It shows that a proviso
 1896. that the guardians shall every year pay off one-twentieth part of
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The second case is *The Queen v. The Churchwardens and Overseers of the Poor of Hurstbourne Tarrant* (1). That case was decided in 1858, and could not therefore have been known to the advisers of the Clonmel guardians at the time of the loan; but *Carpenter's Case* (2) was decided in 1807, and its principle may be assumed to have been known to those concerned in the management of Poor Law affairs in 1851; and, as I have said, the deed of 1851 appears to have been extremely carefully prepared. This case, however, was subsequent to that deed. The question arose on the expenses of survey and valuation of the parish; and in the bond creating the charge for these expenses there were provisions for the payment off of not less than one-fifth of the sum charged with interest in each succeeding year till the whole was repaid. More than five years elapsed since the making of the bond, and the whole sum was not discharged. The question came on for decision on an application for a mandamus to compel the officers of the parish to pay the amount remaining due on the bond. The argument in that as in the other case was founded on the Act authorizing a charge on the rates for the payment of the expenses, "*not less than one-fifth of the whole sum to be paid off in each year.*" Mr. Lush says, "The true construction of this Act is, that the charge is to be by instalments payable out of the rates of these specific five years." Lord Campbell, C.J. :—"If that be so, what remedy would the creditor have in case the last instalment was not paid in the fifth year. You may suppose the rates of that year all raised and applied to other purposes?" The answer is, "It may be that there is no remedy." And Wightman, J., says :—"The section authorises a charge generally on the rates; then follows a direction that a provision shall be made for paying off the charge. But is that more than directory on the parish officers?" On the form of the deed here interest at the rate of 6 per cent. was reducible to

(1) E. B. & E. 246.

(2) 6 A. & E. 794.

5 per cent. on punctual payment of the interest, and that would appear to contemplate that the interest might not be paid punctually. That does not give any additional power, but it shows what the parties had in contemplation. In *Hurstbourne Tarrant's Case* (1), Lord Campbell says :—" On the whole, I think that this application should be granted. For by the enactment in question the guardians had a right to provide for the payment of the costs, either by a separate rate or by a charge on the poor-rates; in the latter case there is a direction that provisions shall be made for paying off the charge in five years; but still the guardians have a right to charge it on the rates generally. Here they do charge it on the rates, and make provisions such that the parish officers ought to have paid it off in five years. The officers did not do so; but I cannot say that the right to recover payment out of the rates is therefore gone. Nevertheless the application to this Court ought to be made within a reasonable time; and here the *onus* lies on the bondholder to show that he has not in this delay been guilty of negligence"; and Wightman, J., says :—" The Act says that provisions shall be made for paying off not less than one-fifth of the money charged in each succeeding year; but it does not limit the payment to one-fifth out of the rates in each of these years. The whole may be paid in one year; and if it is not paid off in five years, the creditor may apply for a mandamus"; and Erle, J., says :—" The guardians borrowing this money had power to charge it on the rates; and the provisions following are not obligatory, but directory. I come to this conclusion with some reluctance; for I think the ratepayers in 1840, and the succeeding years, were the parties who ought to have defrayed these charges."

It really does not very much affect the case, but it seems to be a matter which, if I may take into account, does strengthen the plaintiff's case, viz. What was the nature of the expenditure in this case? It was not expenditure for matters of a merely temporary character or for things that pass off, but for the purchase of the fee-simple of land and the building of a workhouse of which all future ratepayers would get the benefit. If it has been sold, as

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was stated at the Bar, it might be suggested that the money received for it might well have been expended in paying off the plaintiff's loan. However, it certainly is a stronger case in favour of the plaintiff than where there has been a borrowing of money for a merely temporary purpose, such as the making of surveys or repairs. There could therefore be no question had this case come up for decision before the judgment of the House of Lords in *The Queen v. The Churchwardens of All Saints, Wigan* (1), as to how it should be decided. Now, does that case alter the law?

In *The Queen v. The Churchwardens of All Saints, Wigan* (1), the question arose not under the Poor Law Statutes, but under an analogous statute providing for repairing churches. 5 Geo. 4, c. 36, enacted that "it shall and may be lawful for the churchwardens, &c., of the poor in any parish in England and Wales . . . to make application to the Commissioners," &c., "for any loan or advance" (under the powers of the Acts mentioned) "of such sum as may be necessary for defraying the expense of rebuilding or repairing or extending the accommodation in any church or chapel of any such parish or district," and "it shall be lawful for the churchwardens or chapelwardens, and the overseers of the poor in respect of which such loan shall be advanced as aforesaid, and their successors, from time to time, for the time being, and they are hereby authorised and required to make such annual or half-yearly rates, for the repayment of the sums so advanced in such proportions, and at such times as shall be directed and appointed by the said Commissioners in that behalf, and to assign the rates so to be made as aforesaid, as security for the repayment of the sums so advanced in such manner and form as the said Commissioners shall direct and appoint, and so as to secure the payment of all sums so advanced, with interest thereon at and after the rate of 4 per cent. per annum, by annual or half-yearly instalments on the amount of the principal money advanced, within the period of twenty years at farthest from the advancing of any such sum respectively." That was the power under which the deed in question in the case was made, and in reference to which the question arose. The churchwardens had power to make a

(1) 1 App. Cas. 611.

special rate, and to assign the rate that should be so made, for the purpose of building or repairing the church. It appears that there was no rate in existence at the time of default in payment of the money, for it is stated in the report that at a vestry convened in July, 1854, the motion for levying a church rate for payment of the fifth instalment of the loan was refused, and therefore there was no rate in existence, and no continuous charge. In the argument of that case (the money having been lent by the Board of Works) the Attorney-General appeared for them, and pressed for payment on the authority of *Rex v. Carpenter* (1), and *Reg. v. Hurstbourne Tarrant* (2). He says:—"In *Rex v. Carpenter* (1), where a delay of this sort took place, it was held that it did not extinguish the debt. The same rule was applied in *Reg. v. St. Michael's, Southampton* (3)." Lord O'Hagan says:—"But in that case there were no words of limitation as to time. Here they are expressly introduced," and Lord O'Hagan again asks, "Can it be said to be matter for the exercise of discretion when the words used are prohibitory?" The House of Lords held that there was no power to levy a rate for the purposes of paying the money after the expiration of twenty years. Lord Chelmsford says:—"The determination of the question upon this appeal depends entirely upon the powers of the Public Works Loan Commissioners, and the obligations of the churchwardens of Wigan under 5 Geo. 4, c. 36. These powers and obligations are clearly explained and limited by the first section of that Act. It was argued for the Commissioners that these provisions are merely directory. It is difficult to understand in what sense this is meant, for nothing can be clearer to my mind than the imperative character of the Act to prevent the Commissioners making a loan on any other terms than the one of securing the payment of it by annual or half-yearly instalments within the period of twenty years." And he says: "Now ought this mandamus to have issued? That question depends entirely (as I have already said) upon the Act of Parliament. The Commissioners of Works could only make loans on certain conditions. The churchwardens could only borrow on certain conditions. The conditions upon the

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(1) 6 Ad. & E. 794. (2) E. B. & E. 246. (3) 6 E. & B. 807.

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Commissioners are that they must lend on security of rates for the repayment by annual or half-yearly instalments within twenty years at the farthest. They have no power to lend on any other terms. The condition on the churchwardens is that they must borrow on the terms of repaying the loan by annual or half-yearly rates within twenty years. They can borrow on no other terms. The intention of the Act with respect to these loans appears to be that the ratepayers in the parish (a fluctuating body) should be chargeable for twenty years with rates in discharge of the loan, but that ratepayers after twenty years should not be liable, which could not be, unless, after the twenty years, the rates were no longer chargeable with the payment of the loan." And Lord Hatherley says: "The case is clear of all the authorities which have been cited, because they appear to have been decided upon the simple ground that if there is an express power of charging indefinitely the rates, that power will not be diminished because there is a provision made for the payment of the debt in a certain manner, there being no proviso that if the debt is not paid in that manner the debt is to be acquitted or discharged." And Lord O'Hagan, in language almost identical, comes to the same conclusion. He says (p. 630): "As to the authorities which have been cited for the appellants, my noble and learned friends have dealt with them sufficiently. In all cases of construction like this the specific terms of each statute must be carefully considered, and those authorities will be found to apply to Acts quite distinguishable from those before us. Lord Coleridge has pointed out that in *Reg. v. St. Michael's, Southampton* (1), and *Reg. v. Hurstbourne Tarrant* (2) the amounts in question were charged upon the rates, whereas here they were not . . . Here the Act clearly says that the debt shall be paid within twenty years, and within twenty years 'at farthest,' and the Commissioners get power to have payment made 'in such proportions, and at such times' as they shall direct and appoint. I shall only add that in those cases, and in every other which has been relied on, the phraseology of the Acts has been very different from that with which we are dealing, and in none of them will be found the strong, clear, and unequivocal limitation which warrants

(1) 6 E. & B. 807.

(2) E. B. & E. 246.

us in adopting a view consonant, in my opinion, at once with legal principle and natural justice."

That decision proceeds on the ground of the specific terms of the statute, and not only does not overrule, but does not, in the slightest degree, question *Rex v. Carpenter* (1), or *Reg. v. Hurstbourne Tarrant* (2).

The principle is that when you have a charge upon rates existing and future, a direction to pay within a fixed period, or by certain instalments, is directory only, and not mandatory; but that when the only charge is upon a rate to be specially made for the purpose, or upon the rates for certain years only, the statutory provision must be strictly followed, otherwise the debt will be lost.

As to the question of *laches*, I am quite unable to see how any such defence can be relied upon. There could be *laches* only on the assumption that a legal right had been pretermitted. If there is no right it is not necessary to consider the question. But if in 1852, when the first instalment became due, the lender allowed it to remain over, there is no *laches* in that, unless there was a duty cast on him of seeing that it was repaid to him at the stipulated time. He regularly received interest on his loan. It has been paid till just before action—till 1895. It was competent for him to allow the principal to remain outstanding. The deed on that point is the act of both parties, and taking it as a *bona fide* expression of the intention of both, it can hardly be questioned that if, on its construction, the money was charged on the rates, and continued a charge on them, there was no *laches* in not recovering the money secured by the mortgage within six months. And the deed favours that construction, providing, as it does, for the reduction of the rate of interest on its punctual payment; and the payment of interest, after the expiration of the twenty years, is a powerful fact to show that both parties considered and treated the loan as one legally subsisting. I am, therefore, of opinion that the non-receipt of the instalment, both parties believing that it might be held over, does not constitute *laches* on the part of the plaintiff.

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The curial part of the judgment was as follows:—

“THE COURT doth declare that the sum of £1000 in the pleadings mentioned, together with interest thereon from the 26th day of June, 1895, at the rate of five per cent. per annum, secured by said indenture of charge, dated the 26th day of June, 1851, is well charged on the rates leviable for the relief of the poor of the Clonmel Union; and this Court doth order that a mandamus do issue, directed to the defendants, the Guardians of the Poor of the Clonmel Union, to pay the said sum of £1000 and interest aforesaid, and, if necessary, to strike a sufficient rate to pay same.”

Solicitor for the plaintiffs: *Arnold Power*.

Solicitor for the defendants: *D. J. Higgins*.

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IN RE MILLER, DECEASED.
CLANCY v. O'CALLAGHAN.

(1896. No. 601.)

Will—Trust for legatee—Discretion given to executor as to time and mode of payment—Legatee absolutely entitled.

A testatrix gave to her executors a sum of £1000 in trust for her brother, to be paid in such sum or sums, share or shares, and at such time and manner as they should think proper, and bequeathed the residue of her property to her executors in trust, as to one-half thereof, for her brother in like manner:—

Held, that the brother was absolutely entitled to the legacy and share of residue, freed from the exercise of any discretion by the executors.

SUMMONS.

This was an application brought by the plaintiff, Timothy Clancy, a legatee under the will and codicil of Mary Miller, deceased, and also entitled to the legacies thereby left to his brother John Clancy, to determine the following questions:—

1. Whether, under the provisions of the said will and codicil, the plaintiff was entitled to be paid, as soon as the personal estate of Mary Miller had been realized, the legacy and share of residue by the said will bequeathed to or in trust for the plaintiff in manner provided by the said will and codicil.

2. Whether, under the provisions of the said will and codicil, the defendant Richard Rea, as executor of John Clancy, and the plaintiff as beneficial owner of the legacies by the said will and codicil bequeathed to the said John Clancy, were entitled to be paid, so soon as the personal estate of the said Mary Miller had been realized, the legacy and share of residue by the said will and codicil bequeathed to or in trust for the said John Clancy in manner provided by the said will and codicil.

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Mary Miller made her will dated December 2nd, 1886. The portion material to the present application was as follows:—"I give, devise, and bequeath unto my executors hereinafter named the sum of £1000 in trust for my brother Timothy Clancy, of Ballyoran, in such sum or sums, share or shares, and at such time and manner as they think fit and proper. I give my said executors the sum of £500 in trust for my brother John Clancy of Ballyoran, to be paid in such share and shares, and at such time or times as they think proper." The testatrix then gave several legacies to other persons, and the residuary bequest was as follows:—"I leave the rest, residue, and remainder of my property of every kind whatsoever of which I may die seised and possessed of or entitled to unto my executors, in trust for my two brothers equally, share and share alike, and to be paid them at such time or times, and in such manner as they think proper."

By a codicil dated October 19th, 1891, the testatrix varied the legacy to John Clancy as follows:—"I leave my brother John Clancy only £300 instead of £500 stated in my will; and I direct that my executors have full control and discretion to invest the said sum as they may think proper, to be paid and payable at such time and in such manner as they may think best and proper for his welfare; and I will that the said bequest shall be in full discharge of all claims he may have against me or against my brother Timothy, or against his property or assets." The testatrix appointed the Rev. Patrick O'Callaghan and Charles Furlong her executors.

The testatrix died on October 20th, 1891, and on December 9th, 1891, probate was granted to the executors above named.

John Clancy died on January 13th, 1895, having by his will dated March 8, 1894, bequeathed to his brother Timothy Clancy

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all his interest in the moneys to which he was then or might at any time thereafter become entitled under the terms of the will of his sister Mary Miller, which moneys were in the hands of the Rev. Patrick J. O'Callaghan and Charles John Furlong as executors of his said sister, and directed that his said brother should have the same for his sole and absolute use. Richard Rea and David Rice were appointed executors. On June 1st, 1855, probate of this will was granted to the said Richard Rea, the other executor having renounced.

The debts of Mary Miller were duly paid, and her estate practically realized, and there was in the hands of her executors the sum of £2300 Consols, and the sum of £444 12s. 2d. cash, representing the legacies and share of residue left to the said John Clancy and the plaintiff Timothy Clancy, respectively. Application was made to the solicitor for the executors of Mary Miller for payment of the moneys to which the plaintiff was entitled; but the solicitor contended that the executors had an absolute discretion as to the disposal of all the said moneys, and that it would be a dereliction of duty if they gave the entire amount to the plaintiff as he required.

This summons was accordingly taken out by Timothy Clancy to determine the questions above mentioned, the executors of Mary Miller and the executor of John Clancy being made defendants.

H. D. Conner, in support of the summons.

Matthew J. Bourke, Q.C., for the executors of Mary Miller.

Ignatius O'Brien, for the executor of John Clancy.

THE MASTER OF THE ROLLS:—

I think that the executors in this case have not acted capriciously, but at the same time that they have misconceived their duties as to this legacy to Timothy Clancy. Timothy Clancy is entitled under the will to a legacy of £1000 and to half the residue. The legacy of £1000 is given in these words: "I give to my executors the sum of £1000 in trust, for my brother, Timothy Clancy of Ballyoran." If the will had stopped there, there would be no doubt; but it goes on:—"in such share

or shares and at such time and manner as they think fit and proper." The testatrix then gives to her executors £500 in trust for her brother, John Claney of Ballyoran, to be paid in such share or shares and at such time or times as they think proper. After giving certain pecuniary legacies she disposes of the residue as follows:—"I leave the net residue and remainder of my property of every kind whatever, of which I may die seised or possessed of or entitled to unto my executors, in trust for my two brothers equally, share and share alike, and to be paid to them at such time or times and in such manner as they" (*i.e.* the executors) "think proper."

No doubt the testatrix had something in her mind as to her two brothers, and their probable conduct in dealing with the legacies, and that was why she wished that her executors should have some control over the money: but her will does not say that anyone else is to have the legacies in any defined event; there is no gift over: nor is anyone else given a share of the residue. There is a clear gift of the whole £1000 to Timothy; there is no discretion given to the executors to give him a portion only of the money, and to withhold the rest; the whole £1000 is for Timothy, and there is no gift over. On principle, if there were no cases on the subject, it is perfectly clear the money belongs to Timothy, and to no one else, and that the executors have no power to retain any part of it. Even if they had such power, the result as to the money legacies would be the same, as the sum retained would fall into the residue. It is inconsistent with the nature of personal property (save in some well-known exceptional instances, such as coverture and infancy) that one person should be absolute owner of it, and that another person should have power to retain it against him. If the money was withheld for a time, the interest on it would belong to the legatee, who is thus sole owner of both principal and interest. Suppose the legatee sold his legacy, or became bankrupt, the purchaser, or the assignees in bankruptcy, would have a clear right to the legacy. It is not the case of a life interest being given defeasible in a certain event, nor is it the case of a legacy to a person under disability, *e.g.* an infant or a lunatic. The legatee here is *sui juris*, and no one else has any interest. The testatrix has expressed an intention to superadd to the

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absolute gift incidents which the law does not allow. The case of *Snowdon v. Dales* (1) is in point, and the case of *Mills v. Johnston* (2) is particularly so; but, if there were no authority on the subject whatever, I am perfectly clear that the right to the property carries with it the right to the possession. The case resembles the class of cases where money is given to a person for a particular object—the gift does not fail because the particular object cannot be carried out; for example, money given to buy a commission in the army, or to provide a university education; again, a gift of money to a person for the purpose of enabling him to publish a manuscript work of the testator, does not fail because the purpose cannot be carried out. There is no such thing known to the law as an absolute gift of a fund, coupled with a fetter or restriction on its enjoyment, in the case of an object *sui juris*. In the case of the legacy to the other brother, John Clancy, it was not attempted to be argued that on his death any discretion was left to the executors as to the disposition of his legacy. The same considerations which apply to the legacy to Timothy apply to his share of the residue. The law of the case is clear, but no blame can be attached to the executors in coming to the Court for directions; and the costs of all parties will come out of the estate.

Solicitors for the plaintiff: *Thomas Exham & Sons.*

Solicitor for the defendants O'Callaghan and Furlong:

R. Rice.

Solicitor for the defendant Rea: *W. J. Magnier.*

W. L.

(1) 6 Sim. 524.

(2) [1894] 3 Ch. 204.

M'EVOY *v.* M'EVOY.

(1894. No. 434.)

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Oct. 27.

Nov. 7.

*Lease for life in being—Order fixing a fair rent—Status of former lessee—
Devolution of tenant's interest—Land Law (Ireland) Acts, 1881 (sect. 21),
and 1887 (sect. 1).*

A lessee holding a farm of land under a lease for a life in existence, or for thirty-one years, served an originating notice under sect. 1 of the Land Law (Ireland) Act, 1887, and obtained an order of the Land Commission dated the 29th June, 1888, fixing a fair rent. He died intestate in 1893, during the existence of the life mentioned in the lease:—

Held, that the lessee had acquired the *status* of a present tenant by reason of the adjudication of the Land Commission relieving him from the estoppel of his lease and fixing a fair rent on his application, and that his interest in the farm of land, on his death intestate, formed part of his personal estate.

FURTHER CONSIDERATION.

By lease dated the 29th September, 1853, Viscount Gormaston demised unto John M'Evoy, his heirs, executors, administrators and assigns (if permitted to assign), part of the lands of Muff, in the parish of Nobber, and county of Meath, containing 69A. IR., Irish measure, to have and to hold the said lands and premises from the 29th September next ensuing for the term of the life of His Royal Highness the Prince of Wales, or for thirty-one years, whichever should last the longer, paying the yearly rent of £102 4s. 11d., together with the labour of two horses and two carts for two days in each year, or thirty shillings in lieu thereof. The estate and interest of the lessee subsequently became vested in Philip M'Evoy, who on the 28th September, 1887, served an originating notice to have a fair rent fixed in respect of the farm of Muff. By order of the Land Commission dated the 29th June, 1888, it was declared that Philip M'Evoy was to be deemed a present tenant of the holding, and the rent thereof was fixed at £102 4s. 11d.

Philip M'Evoy died the 1st May, 1893 (during the lifetime of the Prince of Wales), a bachelor and intestate, and letters of

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administration of his personal estate and effects were, on the 22nd June of the same year, granted to the defendant. The plaintiff as one of the next-of-kin brought an action for the administration of the personal estate of the deceased, and by order of the Master of the Rolls, dated the 15th May, 1895, accounts and inquiries were ordered to be taken. By his certificate, filed the 1st July, 1896, the Chief Clerk found that the farm of Muff formed portion of the outstanding personal estate of the intestate.

The question as to whether the farm was real or personal estate of the intestate was submitted to the Court on further consideration.

Law, Q.C., for the plaintiff:—

We submit that the farm in question forms part of the personal estate of the intestate.

Sturges v. Ryan (1) decides that a lessee cannot be sued on a covenant to pay rent in his lease when a fair rent has been fixed on the application of an assignee of the lease under the Act of 1887. The basis of the decision in *Connolly v. Tyrrell* (2) is that a different *status* is acquired by the lessee who becomes a present tenant. The lease is gone, and a statutory tenancy is substituted for it: see the judgment of Walker, C., in that case. *Smyth v. Moore* (3), which is followed by *Johnson v. Egan* (4), shows that this result is not attained until there has been an adjudication on the originating notice. *Re Rutledge* (5) is not a decision to the contrary. The exact point was not involved in that case, and the observations of Monroe, J., on the subject amount to no more than a *dictum*. *In re Gray* (6) decides that an agreement between lessor and lessee of a lease for lives under the Act of 1881, fixing a fair rent, changes the devolution of the tenant's interest, and the case is directly in favour of the plaintiff's contention. In *Re Parke, deceased* (7), it is expressly decided that when a lessee for lives has had a fair rent fixed the nature of his tenancy is changed from realty to personality.

(1) 24 L. R. Ir. 305.

(2) 32 L. R. Ir. 97.

(3) *Ibid.* 129.

(4) [1894] 2 Ir. R. 480.

(5) [1895] 1 Ir. R. 328.

(6) [1894] 1 Ir. R. 65.

(7) 1 Ir. Weekly L. R. 168.

Carton, Q. C., for the heir-at-law :—

This farm is real estate of the intestate. The provisions of the original contract between lessor and lessee remain binding save so far as they are modified by the order fixing the fair rent, and so far as they are not inconsistent with the statutory tenancy. That the lease should be absolutely destroyed was not contemplated by the Act of 1887. By the first section of that Act a lessee is enabled to anticipate the expiration of his lease, and then section 21 of the Act of 1881 applies, and such a lessee is to be deemed a tenant of a present ordinary tenancy subject to the conditions of his lease, so far as such conditions are applicable. There is nothing to show that the devolution of the tenancy is altered, and it would be an extraordinary thing to hold that the property of the heir is confiscated without an express statement in the Act to that effect. The cases cited fall short of express decision that an order fixing a fair rent under the Act of 1887 changes the tenure of a lessee's holding. *Sturges v. Ryan* (1) only decides that the liability on the covenants of the original lessee, who has assigned to another, is gone. *Connolly v. Tyrrell* (2) does not assist the plaintiff. In *Re Gray* (3) the facts were peculiar. There was an agreement between lessor and lessee and declaration fixing a fair rent, and it was held that the agreement was entered into on the basis of a surrender of the lease, with the result of creating a tenancy from year to year. *Re Rutledge* (4) decides the matter in our favour. The point now in question was involved in the conclusion come to in that case, which was that a fair rent order under the Redemption of Rent Act, 1891, did not alter the old tenure of the holding. *Re Parke* (5) as reported is a most unsatisfactory case. The heir-at-law was not represented, and no argument was allowed to be addressed to the Court by the administrator who wished to contend that the tenant's interest was real and not personal. The point of the case would appear to be that the administrator was bound to include in his affidavit every possible asset of the deceased.

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(1) 24 L. R. Ir. 305.

(2) 32 L. R. Ir. 97.

(3) [1894] 1 Ir. R. 65.

(4) [1895] 1 Ir. R. 328.

(5) 1 Ir. Weekly L. R. 168.

M. R. *Drummond, Q.C.* (with him *Clancy*), for the defendant, the
1896. personal representative:—

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M'Evoy. The effect of the Land Law Act of 1887 is that the lease is blotted out altogether. The lease comes to an end, and the tenancy becomes subject to conditions inconsistent with its continuance. In the first section of the Act of 1887 the expression "shall be deemed to be," is equivalent to "shall be." One of the objects is the limitation of the length of term, and when the lessee has had a statutory term fixed, his holding becomes subject to all the provisions of the Act of 1881, with regard to present tenancies. See observations of Fitz Gibbon, L. J., in *Mairs v. Lecky* (1), at p. 485.

The several provisions of section 1 of the Act of 1887 are inconsistent with the continuance of a freehold estate, when a statutory term has been fixed. So are sections 5, 13, 21 of the Act of 1881, which is *in pari materia* and to be read together with the Act of 1887. Once a fair rent is fixed the tenancy is subject to all the conditions provided for a present tenancy in the Act of 1881, *e.g.* service of notice to quit for breach of statutory condition, resumption as a home farm or residence, &c. Section 3 of the Act of 1881 provides for the devolution of a tenancy to which the Act applies, that is the same tenancy as is created under the Act of 1887, and sect. 2 of the Act of 1887 throws light on the question as to change of *status*.

Nov. 7.

THE MASTER OF THE ROLLS:—

In this action, which was brought for administration of the personal estate of Philip M'Evoy, deceased, who died intestate, a question has arisen whether a farm which he held as tenant to Lord Gormanston was at the time of his death real or personal estate. The proper parties are before the Court to enable the question to be decided, Mr. Carton having appeared and argued the question for the heir-at-law.

By lease of the 29th September, 1853, the then Lord Gormanston demised to John M'Evoy, his heirs, executors, administra-

tors and assigns (if permitted to assign) 112 acres or thereabouts of the lands of Muff, situated in the parish of Nobber, county of Meath, to hold for the life of His Royal Highness the Prince of Wales, or thirty-one years, whichever should last the longer, at the yearly rent of £102 4s. 11*d.*, together with the labour of two horses and two carts for two days in each year, or 30*s.* in lieu thereof. The lease contains a covenant against alienation without license, and other ordinary, and some special, covenants. The term of years, if it had come into operation, would have expired on the 29th September, 1884; but it never became operative, as of course His Royal Highness, the life in the lease, is still living.

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The estate and interest of John M'Evoy the lessee afterwards became vested in Philip M'Evoy, the intestate, who died on the 1st May, 1893.

On 28th September, 1887, Philip M'Evoy served an originating notice under the Land Acts of 1881 and 1887 to have a fair rent fixed; and by order of the 29th June, 1888, the Land Commission declared that Philip M'Evoy, the lessee, was to be deemed a present tenant of the said holding pursuant to the Act of 1887, and fixed the rent at £102 4s. 11*d.*, the same money rent as that reserved by the lease, but omitting the horse labour—or its equivalent—and so being, to that small extent, a reduction of the rent.

The question is whether the effect of this order is to alter that which was previously a freehold interest, and substitute for it a holding of chattel-real tenure. There are no special circumstances in the case.

The question turns upon the Act of 1887, section 1, and section 21 of the Act of 1881. Section 1 of the Act of 1887 provides as follows:—"At any time within two years after the passing of this Act on the application in the prescribed manner to the Court by the lessee of any holding who at the expiration of his lease existing at the passing of the Land Law (Ireland) Act, 1881, would be deemed to be a tenant of a present ordinary tenancy from year to year within the meaning of the said Act, at the rent and subject to the conditions of the lease, or would be so deemed but for the fact that such lease would not expire within sixty years after the passing of the Land Law (Ireland) Act, 1881, such lessee shall, if *bona fide* in occupation of his holding, be deemed

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to be a tenant of a present tenancy in like manner, and subject to like conditions, and subject to the same right of resumption as if his lease had expired, and his holding shall be subject to all the provisions of the said Act of 1881 with regard to present tenancies as if the tenancy therein were a tenancy from year to year." Then there is a restrictive clause which does not apply to the present case.

That brings us back to the 21st section of the Act of 1881 which provides "that at the expiration of such existing leases, or of such of them as shall expire within sixty years after the passing of this Act, the lessees, if *bona fide* in occupation of their holdings, shall be deemed to be tenants of present ordinary tenancies from year to year, at the rents and subject to the conditions of their leases, respectively, so far as such conditions are applicable to tenancies from year to year."

In *Smyth v. Moore* (1) the questions the Court had to decide were :—1, whether the service of the originating notice is the prescribed application to the Court under section 1 of the Land Law (Ireland) Act, 1887 ; 2, whether upon the service of the originating notice the lessee acquires, without any order of the Court, the *status* of a present tenant of a tenancy from year to year in like manner as if his lease had expired, and the holding becomes subject to all the provisions of the Land Law (Ireland) Act, 1881, with regard to present tenancies. The Court decided that the service of the originating notice had not, *per se*, and without an adjudication thereon, the effect of conferring the *status* of a present tenant. Lord Ashbourne (p. 138) says :—"Then the practical question before us is, What are we to do? I do not think that the case comes before us in a very satisfactory manner; but still we can answer the questions settled by the Land Commission and the parties. The answer to the first question will be, "Yes; for the purpose of enabling the tenant to proceed to obtain an order or declaration of the Court upon his application, as prescribed by the Rules of 27th August, 1887, or 13th September, 1887." The answer to the second question will be "No; unless and until the tenant has obtained an order or declaration of the Court upon his

application as prescribed by the Rules of 27th August, 1887, or 13th September, 1887." That is the answer of the Court to the questions stated, and I assume that it was in that way that the matter was sent back to the Land Commission. The second answer is the important one. In terms it does not say that a lessee, when he shall have had a fair rent fixed, is a present tenant of a tenancy from year to year, but it is eminently suggestive of the view taken by the Court of Appeal, though they did not in terms decide the matter. Fitz Gibbon, L.J., says:—"We must, therefore, answer to the first question 'Yes; but only for the purpose of proceedings regularly taken to get a declaration of present tenancy'; but we cannot now decide or assume that the effect of these proceedings, before they have been determined one way or the other, is to fix the *status* of the tenant, and give him, *in presenti*, all the rights and powers of a present tenant. All the confusion and uncertainty which the Lord Chancellor has pointed out in the rules and forms of the Land Commission would be intensified if we were to hold that a lessee who serves an originating notice to fix a fair rent becomes then and there a tenant from year to year for all purposes, and cannot lose that position. It appears to me that he has taken a necessary step towards bringing his case to adjudication, and towards getting a declaration that he is a present tenant. That adjudication when obtained will, in certain cases, relate back, but it cannot be anticipated, and though the notice is 'the prescribed application,' it has only a conditional and inchoate operation as such."

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The point seems really involved in the decision of *Connolly v. Tyrrell* (1) in the Court of Appeal, though not explicitly raised or decided.

In his judgment Walker, L. C., says (p. 100):—"Then comes sect. 1 of the Act of 1887, under which lessees can get a fair rent fixed. That section applies to leases expiring within ninety-nine years after the passing of the Land Act of 1881, and to any lease existing at the passing of the Land Act, 1881, for any life or lives then existing, with or without any term of years not exceeding ninety-nine years, where such term is concurrent, or

M. R. thirty-one years where such term is in reversion. If a tenant had
 1896. a lease of one of these kinds he could, under this section, convert
M'Evoy it into a present tenancy from year to year, provided he served a
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M'Evoy. notice before the prescribed date. The words 'deemed to be' must mean the *status* acquired by the making of the application, and involve a right of resumption, as mentioned in the Act of 1881, and probably also the resumption for the same purposes. Under such circumstances the Court can authorise resumption. But I can well understand that a hardship would arise in the case of a man who had a lease which would not expire, say, till 1980, if he was to be obliged within two years to accelerate its expiration, and the consequent possibility of resumption; and, therefore, a proviso is attached to sect. 1, that, in case of the lessee acquiring this *status* of present tenant by serving his notice, the Court shall not for fifteen years authorise resumption by the landlord under this section—a clause probably suggested by the clog upon the landlord's rights contained in the proviso attached to sect. 21."

And FitzGibbon, L.J., says:—"My view may be very shortly put. Sect. 21 of the Act of 1881 imputes to the lessees mentioned in it, at the end of their leases, the same rights that are given immediately to tenants from year to year. Sect. 1 of the Act of 1887 enables lessees, in proper cases and by proper steps, to expedite the expiration of their leases, and thereby to expedite the time for resumption; but the proviso is added that this resumption shall not be authorised for fifteen years from the creation of the present tenancy, which arises on the expiration of the lease, whether actual or statutory."

That case also goes strongly in the same direction, even if it is not an actual decision on the point.

The case of *Sturges v. Ryan* (1) raised the question as to the continuance of liability for rent under a lease by a lessee who had assigned the lease, after the assignee had caused a fair rent to be fixed under the Act of 1887. The Queen's Bench Division decided that the liability ceased when the fair rent was fixed upon grounds very applicable to the present case. O'Brien, J., says at p. 309:—"How is it possible to apply this situation to a

(1) 24 L. R. Ir. 305.

constructive, as distinguished from an actual, expiration of his lease? If the land be once resumed, what becomes of any right of the tenant after that? In addition to the express right of resumption, assumed in the section to be incident to the new position of the tenant, the latter part of it provides that in the event of a person becoming a present tenant, the Court shall not authorise resumption of the holding for fifteen years, which would be wholly unnecessary, and could have no sense if the lease continued for any purpose. But it was contended that a person was capable of becoming a present tenant, without putting an end to the lease, under the definition of 'present tenant' in the Act of 1881. It is true that 'present tenant' is not stated to be a tenant from year to year, for the same reason that the quantity of the interest would not come into the description of 'future tenant' in the same clause. But the right to fix a fair rent, under the statute of 1881, is only attached to tenancies from year to year, or tenancies for less than a year. And in this case 'present tenant' does not stand alone, but combined with words which confine it to the class who were provided for by the Act of 1881. As to the argument founded on the use of the word 'deemed,' as implying merely an analogy to what would happen upon the lease expiring, and not an actual expiration, that is met by the plain intention of the 1st sect. to range the leases to which it applies into the class of those actually expiring under the 21st sect., and also by the fact that the same term is used in other parts of the statutes to denote an actual, and not a constructive, change. The lessee's covenant is to pay during the term. The covenant is indivisibly attached to the term. A new term comes into existence—a term of fifteen years. Can the lessee's covenant be extended into that new term?" and he decides that the lessee cannot be sued on the covenant. And Johnson, J., says:—"The lease and the term demised by it (and therefore the defendant's covenant for payment of the rent reserved by the lease, during the term demised by the lease) are dealt with by the Act (sect. 1) as having expired; and a new tenancy by W. Ryan to the plaintiff from year to year, and after the fixing of the fair rent, for fifteen years, as having been substituted for the lease and the term demised by the lease." And his judgment proceeds on this

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basis, and accords with that of O'Brien, J., though, no doubt, Murphy, J., and Gibson, J., did not decide any general question directly applicable to the present inquiry.

The Munster Bank v. Parke (1), before the Vice-Chancellor, appears to be a decision in point, although the person interested in the contrary view was not present or represented at the hearing, and the report is so meagre as to be on that ground unsatisfactory. *In re Gray* (2), a decision of the Vice-Chancellor turned upon a different question, that of surrender. *Knox v. Barter* (3) decides that a landlord's right of turbary, existing before the statutory term, is not taken away by the fixing a fair rent, and I do not think the case is of much service in dealing with the present question; nor do I think that *Mairs v. Lecky* (4) throws light upon it. The question, therefore, remains for determination (unless we are to hold that it was finally decided by the Vice-Chancellor in *The Munster Bank v. Parke* (1)), whether the fair rent order in a case like the present has the effect of putting an end to the lease or not. That it does create a statutory term, that is, a yearly tenancy under statutory conditions which will subsist for fifteen years and so forth, there is, I think, no doubt. The first section of the Act of 1887 says that the tenant shall under the circumstances be "deemed" to be a tenant of a present tenancy as if his lease had expired. Under sect. 21 of the Act of 1881 it is "Provided that at the expiration of such existing leases . . . the lessees if *bona fide* in occupation of their holdings shall be deemed to be tenants of present ordinary tenancies from year to year." Whatever meaning is to be attached to the much criticised phrase "deemed to be," I think its meaning in this context cannot be other than "shall be dealt with in a Court of law as being." The "deeming" must be by the Court, and if the Court is bound to deem a thing to exist, the same Court cannot at the same time hold that it does not exist.

It is to my mind then clear that the conjoint effect of both Acts is that if a lessee under the Act of 1887 elects to go into the Land Court and obtains an adjudication relieving him from the estoppel of his lease as to rent, and determining what his rent is

(1) 1 Ir. Weekly L. R. 168.

(2) [1894] 1 Ir. R. 65.

(3) 19 L. R. Ir. 460.

(4) [1895] 2 Ir. R. 475.

to be, as if he were a yearly tenant, he is thenceforth to be deemed to be, and therefore shall be in contemplation of law, a present tenant with all the consequences of that *status*. Of course this does not prevent the conditions of his lease from attaching to the judicial tenancy, so far as they are not inconsistent with a yearly tenancy under the Acts. Indeed this is also the case where an overholding tenant goes into Court.

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Now if this view be the correct one, is it possible to hold that the lessee can be both tenant under the lease and also yearly tenant by virtue of and under the provisions of the Act? I cannot even imagine the possibility of so holding. If the correct view be as put by the Court of Appeal (and I am quite sure it is correct), that the effect in such a case of obtaining a fair rent order is to advance or to accelerate the termination of the lease, the lease is, for legal purposes, at an end. And if *Sturges v. Ryan* (1) is correctly decided, and I am clear that it is, and also if it were not, that it would bind me, it follows that the lease is so far at an end that the fixing of a fair rent by an assignee of the lessee *ipso facto* puts an end to liability by the lessee himself on the covenant for payment of rent. While acquiescing in the view of the learned Judges who did not think it essential to go further than that in the case before them, I, who have now to consider a point beyond that, am of opinion that it follows by inevitable logic that the lease is itself terminated, by having its expiration accelerated by the acceptance by the lessee of another and inconsistent estate.

There is no hardship in so deciding. The tenant need not fix a rent unless he likes, and if he does and still wishes the property to go to his heir, it is in his own hands to affect that object.

Mr. Carton argued that the effect of the Act was to leave the lease subsisting and unaffected save as to the rent, which was to be fixed for fifteen years, and was to be subject to re-adjustment afterwards from time to time, leaving the lease in all other respects subsisting. But this would not be to make the lessee a present tenant at all, nor in any sense a tenant from

(1) 24 L. R. Ir. 305.

M. R. year to year. Nor can it be reconciled with the view of the Court
1896. of Appeal, that the termination of the lease has been anticipated,
M'EVoy nor with that of the Queen's Bench Division, that the covenant
v. in the lease for payment of rent is absolutely gone.
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The Acts are no doubt drawn, as they now stand, with the utmost looseness. The question in this case, a very large one, and of very general application, would not seem to have occurred to anybody in framing them; though except to a politician it would seem to have been an urgent one, on the very surface of the whole matter. My opinion is, however, that the lease, once thrown into the crucible and fused to get at the pure metal of the fair rent, is itself consumed, or rather transmuted, in the process. The lease is gone, though such of its provisions as would have survived and bound a yearly tenancy created by overholding after its expiration, are by law introduced into and incorporated with the statutory tenancy from year to year, save so far, if at all, as they would conflict with the *status* of a present tenant.

Solicitor for the plaintiff: *Marcus Purcell*,

Solicitor for the defendant and the heir-at-law: *C. Friery*.

R. W. L.

IN THE MATTER OF THE ESTATE OF ARTHUR DUFFY,
OWNER; CHARLES M'EVOY, PETITIONER.

Ross, J.
1896.

Dec. 7, 21.

*Railway—Superfluous lands—Abandonment—Derelict line—Statute of
Limitations.*

Appeal.
1897.

March 12.

Lands were compulsorily taken in 1863 by a Railway Company under their statutory powers for the purpose of constructing a railway through certain private and other quays in Dundalk. The railway was to be complete in 1869, but it was not finished until 1875, when on trial it was found to be defective, and was never used by the public for traffic. A swivel bridge, part of the works, fell into the water, and the rails were allowed to be partly effaced by the traffic on the quays and were partly torn up. After 1875 the Railway Company never made any use whatever of the rails. There was evidence that the public, including the occupiers of the quays, passed over the line as they wished. A tenant of the owner of the lands taken was in the habit of carting coal and salt in which he dealt, over the railway:—

Held (1), that the lands occupied by the line had not become superfluous lands within sect. 127 of the Lands Clauses Act, 1845; (2) that no title had been acquired under the Statute of Limitations by the original owner or the occupiers of the quays.

OBJECTION by the Dundalk, Newry, and Greenore Railway Company to the consolidated final notice to tenants and adjoining owners and occupiers.

By the Irish North-Western Railway Acts, 1862 and 1863, incorporating the Railways (Ireland) Act, 1851, the Irish North-Western Railway Co. was authorised to purchase, and accordingly acquired, 8 perches, Irish plantation measure, portion of the lands shown on the map annexed to the consolidated notice. By the Dundalk and Greenore Railway Act, 1867, the interest of the Irish North-Western Railway Co. in the said parcel of land was transferred to the Dundalk and Greenore Railway Co., who lodged the purchase-money, amounting to £256, in the Court of Chancery, on the 27th January, 1871, in default of good title being made, and thereupon went into possession of said lands. By the Dundalk, Newry, and Greenore Railway Act, 1873, the

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name of the Company was changed to that of the Dundalk, Newry, and Greenore Railway Co. The purchase-money, £256, was afterwards paid out of Court to John F. Duffy, predecessor in title of the present owner.

It appeared from the affidavits that the Company laid a line of rails along the quays at Dundalk; part of the line crossed an open dock by means of a swivel bridge. On trial in 1875 the line was found to be defective, especially in the construction of the bridge. It was never used for railway traffic, and the bridge fell into a dilapidated and ruinous condition, and the rails were gradually worn away or removed by the public traffic, which was carried on across them, along the quays, for a number of years, without objection on the part of the Company.

The following are the material parts of the affidavits used on the hearing of the objection:—James Oakes, formerly coal and salt merchant in Dundalk, stated that he had been in occupation of premises, part of the estate in this matter, as tenant to the representatives of John Charles Duffy, from the year 1870 to the year 1891, and that, during this period, the Dundalk, Newry, and Greenore Railway Co. had never used that portion of the line running over the portion of the quays in question. His affidavit continued:—"The present state of the line is ruinous. Part of it is covered by *débris*, and part torn up. The drawbridge, entering the quays, has been derelict, and the greater part of said drawbridge has fallen into the dock for want of attention. During my tenancy I never used said railway line, as I carted all the coal and salt imported by me for delivery over the railway to the station of the Great Northern Railway Co., distant about 1000 yards from the said premises. In the year 1875, when the railway line was constructed over said premises, I was present when a trial with railway trucks, filled with stones, was made over the said line, and when the trucks passed over the drawbridge it was found to have sunk in the centre, and was always considered dangerous for traffic. No attention was given to the line afterwards."

The owner, Arthur E. Duffy, made an affidavit corroborating these statements.

Mr. Thomas Chambers, Engineer of the Dundalk, Newry,

and Greenore Railway Co., made an affidavit stating that the line in question was constructed under the Dundalk and Greenore Railway Co.'s Act, 1867, and is the Railway No. 2 referred to in sect. 22. That in order to fulfil the terms under which they were authorised to construct the said Railway No. 2, the Company laid their rails and sleepers along the land they had purchased on the quays, including Duffy's-quay, and did not enclose it with a fence, as doing so would have interfered with the general traffic on the quays, contrary to sect. 22 of the Act; and that from the time of its construction to the present, the quay-owners and others, requiring access to the quays, had not been interfered with in carting over or passing along the strip of land so purchased, and the rails and sleepers lying upon it. The Company considered that in allowing this they were fulfilling the statutory obligation imposed on them by the Act. The Company had never allowed any buildings, sheds, or obstructions to be put on the strip of ground, so as to interfere with their railway, and the only use which James Oakes had of the piece of land was carting over same in order to get from his yard and stores to and from the quay wall(1).

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(1) The following sections of the Act (30 & 31 Vict., c. clxxxiii.) were referred to during the arguments:—

Sect. 5. "Subject to the provisions of this Act, the Company may make and maintain in the lines and according to the levels shown on the deposited plans and sections the railways hereinafter described, with all proper stations, approaches, works, and conveniences connected therewith, and may enter upon, take, and use such of the lands delineated on the said plans, and described in the deposited books of reference as may be required for that purpose. The railways hereinbefore referred to and authorized by this Act are." [Then followed the description.]

Sect. 19. "The railways by this Act authorized shall be completed within two years from the passing of this Act, and on the expiration of that period the powers by this Act granted to the Company for executing the said railways, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as shall then be completed."

Sect. 22. "In construction of the railways by this Act authorized the following provisions shall have effect:—

"The Company shall not without the previous consent in writing of the Dundalk Steam Packet Company under the hand of their secretary for the time

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T. S. McCann, for the petitioner having carriage :—

Under the Lands Clauses Act, 1845, within ten years after the expiration of the time limited for completion, the promoters are to sell superfluous lands; in default of doing so such lands are to vest in and become the property of the owners of the adjoining lands: *Brown and Theobald, Law of Railways*, 231, where the authorities are collected. The meaning of "superfluous lands" was considered by the House of Lords in *The Directors, &c. of Great Western Railway Co. v. May* (1). A title has been acquired by the owner under the Statute of Limitations: *Bobbett v. South-Eastern Railway Co.* (2).

R. H. Macrory, for the Railway Co. :—

There was no dispossession of the Company: *Leigh v. Jack* (3). The user by the public was consistent with the right reserved to them by section 22 of the Act (30 & 31 Vict. c. clxxxiii). "Superfluous lands" in section 127 of the Lands Clauses Act, 1845, does not mean the line itself. "Thereof" in the prefatory sentence means "of the undertaking": see judgment of Lord Cairns, L.C., in *Directors of Great Western Railway Co., &c. v. May* (4). "Permanent works of the line"—a phrase used by his Lordship, must mean something different from the line itself: *Smith v. Smith* (5); *Hodges on Railways*, vol. i., 333.

[Ross, J.: In the Special Act in *Smith v. Smith* (5) there was a section as to abandonment.]

If superfluous lands included the railway itself such a section would be unnecessary. The line could not be made at all without

being open for public traffic Railway No. 1 until they shall have completed for public traffic Railway No. 2.

"The Company shall construct Railway No. 2 so as not to unnecessarily interrupt or inconvenience the general traffic on the quays at Dundalk or the roads leading therefrom and thereto, and so as not to interfere with the due accommodation to each of the said quays.

"Until the said railways shall have been opened for public traffic it shall not be lawful for the Company to carry on any Steam Packet traffic from the port of Dundalk to or with any other port of the United Kingdom, or to or from any terminus of the Company at Dundalk."

(1) L. R. 7 H. L. 283.

(2) 9 Q. B. D. 424.

(3) 5 Ex. D. 264.

(4) L. R. 7 H. L. at p. 292.

(5) L. R. 3 Ex. 282.

the land on which it is constructed, and therefore such land cannot be superfluous. Auxiliary works such as stations, sidings, &c. may become superfluous, but not the line itself. "Superfluous" and "abandoned" are not synonymous. Section 27 of the Abandonment of Railways Act, 1850, does not apply, for its procedure has not been adopted here: *Hooper v. Bourne* (1).

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J. M'Il Dowie, for the owner:—

The ground has become superfluous land through the laches of the objectors: *Directors of Great Western Railway Co. v. May* (2); and is now vested in us as adjoining owners under section 127 of the Act of 1845.

Ross, J.:—

Dec. 21.

This case comes before me on an objection lodged by the Dundalk, Newry, and Greenore Railway Company to the boundaries, as delineated on the map annexed to the final notice to tenants. The substance of the objection is, that a railway line belonging to the Company running right across the premises ordered to be sold does not appear on the map, and that the statement in the final notice is incorrect. The owner and incumbrancers contend that it has rightly been omitted.

It appears that the Irish North-Western Railway Company, whose interest has since been transferred to the objectors, were empowered by their private Acts which, *inter alia*, embodied the Lands Clauses Act of 1845, and the Railways Act of 1851, to take up portion of these lands for the purpose of constructing a railway along the Dundalk Quays. The land was duly taken up; the railway constructed, and under the arbitrator's award the Company paid £256 into Court, which has since been drawn out by the owner's predecessor in title. On the west side of the lands the Company have constructed a swivel bridge; on the east they have filled up an open dock. The line has never really been used for traffic purposes; the rails have been considerably worn away by carting over them; the swivel bridge when tested was found wanting, and is now in a somewhat ruinous condition.

(1) 3 Q. B. D. 258; see judgment of Bramwell, L.J., p. 274.

(2) L. R. 7 H. L. 283.

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The Company's Act of 1865 directed the railway to be completed within three years from the passing of the Act. So far as I can gather from the evidence, which is somewhat meagre, the line was not completed within the time. By the Dundalk and Greenore Railway Act of 1867, the Company were authorised to construct two railways, the line with which I am dealing being No. 2. Both railways were to be completed within two years after the passing of the Act. The Company were obliged to construct Railway No. 2 so as not unnecessarily to interrupt or inconvenience the general traffic on the quays at Dundalk, and so as not to interfere with the due accommodation to each of the quays. Under these circumstances it is contended on behalf of the owner in the first place that the case comes within sect. 127 of the Land Clause Consolidation Act of 1845, that the lands are superfluous lands which the promoters were bound to sell, and that in default of sale they vest in the owner of the lands adjoining.

The policy of the Legislature in this section is very plain. Railway Companies are empowered to take up land compulsorily for a great public purpose, but they are not permitted to retain lands in their ownership for purposes unconnected with their undertaking. When it appears that the lands are not wanted for the purposes of the undertaking, the Company must part with their ownership. In *Directors of Great Western Railway Co. v. May* (1), Lord Cairns points out four ways in which lands may become superfluous within the meaning of the section, being evidently of opinion that every case of superfluous land would be included within some one of the four classes. The judgment contemplates the continued existence of a railway, and the words are not applicable to a case where the railway has been abandoned. The distinction between lands abandoned and lands superfluous is this. In the first case the main line has never been constructed, or if constructed has been left derelict; in the second case the line has been constructed, or lands on which are to be made the necessary works of the line, have been taken up, and along with these other lands have been taken which are found not to be required for the purposes of the undertaking.

The words of the section are not, in my opinion, applicable to a case where the whole undertaking has been abandoned.

I have called counsel's attention to the case of *Astley v. Manchester, Sheffield, and Lincolnshire Railway Co.* (1), where Lord Chelmsford expressed an opinion that the words of the 127th sect. were wide enough to embrace the case of an undertaking being abandoned. The question now before me did not directly arise, the *dictum* had reference to what the legal rights of the plaintiff might be at the expiration of the ten years mentioned in the section, which at that time had not expired. The decision in no way logically rests upon the opinion expressed in the *dictum*. On the other hand, in *Smith v. Smith* (2), the question before me was discussed at length. A section in the Company's original Act contained provisions which were to take effect in case of the abandonment of the railway. By a later Act all the provisions of the original Act, save in so far as they were inconsistent with the Lands Clauses Consolidation Act, 1845, were extended to the later Act. It was contended that the abandonment section related to the same subject-matter as sect. 127 of the Lands Clauses Consolidation Act, 1845, and was inconsistent with it, and that therefore the abandonment section was not incorporated in the later Act.

Baron Bramwell, in pronouncing the judgment of the full Court, held there was no inconsistency. He asserts that the section does not apply when the railway is abandoned, but to a case of superfluous land. It is true that the effect of the abandonment section in the earlier Act, and sect. 127 of the Lands Clauses Act was, in the opinion of the Court, in that case the same, but the observation was intended to be a general one, and was not confined to the facts of the particular case. In my opinion it is sound in law, and I therefore hold this line is not superfluous land within the meaning of the section.

The next contention, on behalf of the owner and incumbrancers is, that assuming these not to be superfluous lands, the right of the Company is barred by the joint effect of 3 & 4 Wm. 4, c. 27, sect. 7, and 37 & 38 Vict. c. 57, sect. 1. In the case of *Bobbett v. The North-Eastern Railway Co.* (3), it was held by Mr. Justice

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(1) 2 De G. & J. 453. (2) L. R. 3 Ex. 286. (3) 9 Q. B. D. 424.

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Denman that the mere fact that the property in question was land taken for the purpose of the undertaking, and not superfluous land, would not prevent a person who had exclusive possession for twelve years from being entitled to the land by virtue of the Statute of Limitations. Assuming the statute to apply, two things are requisite to bar the Railway Company. Absence of possession of the land on which the railway stands, and actual possession by another during the prescribed time. This is the law, as stated in the judgment of Lord Macnaghten in *The Trustees, Executors, and Agency Co. v. Short* (1). Baron Parke says in *Smith v. Lloyd* (2):—"There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute."

What are the facts here? The Company have not had trucks on the line since 1875, and they produce no evidence of any other user by them since. This may amount to absence of possession by the Company, but where is the evidence of actual exclusive possession by the owner in this matter? The only real evidence in the case is that of James Oakes, the tenant, to the owner. He swears the drawbridge has been derelict, and is in a ruinous state. During his tenancy he never used the railway line, but he carted all the coal and salt he imported over the railway to the station. Arthur Duffy in his affidavit makes the vague statement that the tenant has used the premises in his business for the last sixteen years. But under sect. 22 of the Dundalk and Greenore Railway Act of 1867 the tenant had a perfect right to do everything he has done. The Company were bound to construct this railway so as not to unnecessarily interrupt the general traffic on the quays, and so as not to interfere with the due accommodation to each of the said quays. He does not allege that he put any obstruction on the line. Everything he did do, so far as I can see, he could not have been prevented from doing, if the Company were using the line. The rails may have been worn by the carting over the sleepers, and may have become rotten, the swivel bridge may have become ruinous from want of repair. The owners in this

(1) 13 App. Cas. 799.

(2) 9 Ex. (Welsby, Hurlstone & Gordon), 562.

matter, if they are to succeed, must prove, and have not proved, that they were in actual exclusive possession of the line. In *Leigh v. Jack* (1) Lord Bramwell puts the matter thus:—"Acts of user are not enough to take the soil out of the plaintiff, and vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil, for the purposes for which he intended to use it." No such acts have been proved here. I therefore hold the Company has never been dispossessed, and allow the objection with costs.

It would not be right for me to leave the subject without saying that, while the case was well argued on both sides, I was particularly struck with the exceedingly able argument of Mr. Macrory.

W. G.

The owner appealed to the Court of Appeal (Lord ASHBOURNE, C., and FITZ GIBBON and WALKER, L.JJ.).

Appeal.
1897.

March 12.

Ignatius J. O'Brien, for the appellant.

T. Pakenham Law, Q.C., and *Macrory*, for the respondents (the Railway Co.), were not called on.

THE COURT dismissed the appeal with costs.

Solicitor having carriage: *Charles Mac Mahon*.

Solicitor for the owner: *J. H. Callan*.

Solicitor for the Railway Co.: *R. A. Macrory*.

R. D. M.

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1896.

Dec. 7.

IN THE MATTER OF THE ESTATE OF F. S. S. CASSAN.

Practice—Attachment—Motion—Affidavit of service.

It is not irregular to serve notice of motion for a writ of attachment, instead of obtaining in the first instance a conditional order.

An affidavit of service must state that the deponent was at the time of service acquainted with the appearance of the person served.

MOTION on behalf of the incumbrancer having carriage for an attachment against the owner for non-compliance with an order to lodge deeds.

The order was served personally on the owner, but did not bear the indorsement prescribed by Order XLI., Rule 4, of the Supreme Court (Ireland), 1891, and the affidavit of service of the order did not state that the deponent was personally acquainted with the owner. An affidavit was made by the owner's solicitor explaining the delay in not lodging the deeds, and undertaking to do so; and in substance the only question discussed was the costs of the motion, which counsel for the owner contended was upon technical grounds irregular.

G. W. Walker, in support of the application :—

The indorsement prescribed by R. S. C. I., Ord. XLI. R. 4, does not apply to proceedings in the Land Judge's Court. It was so held by Mr. Justice Monroe in several cases. [Mr. Kennedy, registrar, stated that this was so.] Though it may be usual to proceed for an attachment by conditional order, there is nothing in the Rules governing the practice of this Court making it obligatory to do so: *Wallace v. Graham* (1); *Thomas v. Palin* (2).

J. Leech, for the owner:—

The practice of the Court has been to proceed in such cases by conditional order. If a party departs from the usual practice he disentitles himself to a writ of attachment. This Court is now part of the Chancery Division, and must be governed by Order XLI., Rule 4. The practice in *Wallace v. Graham* (1) and *Thomas v. Palin* (2) has been changed by the Rules of 1891: *Hampden v. Wallis* (3); *Commissioners of Church Temporalities v. Harrington* (4).

Further, the affidavit of service does not state that the person serving the order was acquainted with the appearance of the person when it was served. This is a fatal defect. By the Rules of the Landed Estates Court, 1859, R. 62, affidavits can only be used in this Court when they are in the form of affidavits which could have been used in the Court of Chancery. R. S. C. I., 1891, Order XXXVIII., R. 8, which only expresses what was always the practice of the Court of Chancery, is most specific upon this point in requiring that an affidavit of service must state that the deponent was acquainted with the appearance of the person served: Form No. 78, Madden's Land Judge's Practice, 3rd Ed., page 545.

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Ross, J. :—

Mr. Walker's client has served notice of motion for an attachment. Mr. Leech says that this is irregular, and that in the first place a conditional order should have been obtained. I hold that it is not irregular to serve notice of motion for an attachment, for although Mr. Justice Monroe held that the practice of this Court was not affected by the Rules of the Supreme Court (Ireland), 1891, my opinion is so strong that no order for an attachment should be made without notice that I shall never hold that it is wrong to serve notice.

Now I come to the second point. Is the affidavit proving service of the order sufficient? I am obliged to hold that it is not.

(1) 11 L. R. Ir. 369.

(2) 21 Ch. D. 360.

(3) 26 Ch. D. 746.

(4) 11 L. R. Ir. 127.

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1896.

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According to the invariable practice, such an affidavit must state not merely the place and time of service, but must state that the deponent knows the person on whom the order is served. The affidavit is defective in that respect. The point is a highly technical one, but having been raised I am bound to decide it.

I cannot give Mr. Walker's client costs against the owner. But, on the other hand, I am satisfied that the order was in fact served, and therefore I will not give costs against him. Let each party abide his own costs.

Solicitors having carriage : *T. and H. Turpin.*

Solicitor for the owner : *Hardman*

W. G.

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1897.

Jan. 20.
Feb. 19.

IN THE MATTER OF THE ESTATE OF MARY ANNE KENNY AND OTHERS.

Practice—Declaration of title—Tenant for life and remainderman.

The Court has jurisdiction to entertain a petition by a tenant for life in possession and the remaindermen for a declaration of title.

A, tenant for life in possession, B, tenant for life in remainder, and C and D, tenants in tail in remainder in default of issue of B who was unmarried, presented a petition for a declaration of title according to their respective rights. There were no contentious claims to possession. The Court, after argument, made an order on the petition.

THIS was a petition for a declaration of title as to lands in the county Galway, and it came before the Court by direction of the Judge, the fiat upon the petition having been postponed in order that the petitioners secondly and thirdly hereinafter mentioned might satisfy the Judge of his jurisdiction to declare the title of owners not in possession of the estate to which the declaration of title was sought.

The petitioners, all of whom claimed under an indenture of family settlement, dated the 8th June, 1881, were :—(First), Mary Anne Kenny, now the tenant for life in possession ; (secondly),

Michael Edward Kenny, tenant for life in remainder expectant on the death of Mary Anne Kenny, with power of appointment to his issue. He was unmarried. (Thirdly), Rose Meldon and Marion Dora Kenny, tenants in common in tail in default of issue of Michael Edward Kenny.

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These parties sought to obtain a declaration of title according to their respective rights, as above stated.

Redmond Carroll, for the petitioners :—

The question which arises is :—Are any of the parties save the tenant for life in possession, Mary Anne Kenny, entitled to petition for a declaration of title? This question may be answered affirmatively for the following reasons :—Section 51 of the Landed Estates Court Act (21 & 22 Vict. c. 72) enables “any owner of any estate in fee-simple” to petition for a declaration of title. Section 1 of the same Act defines “owner” as applied to land, to include “any person beneficially entitled *in possession*,” or “entitled as trustee for sale.” Section 5 of the Record of Title Act (28 & 29 Vict. c. 88) extended the power of the Landed Estates Court to grant declarations of title on the application of any owner of any land or lease, and section 2 of the same Act defined “owner” to be (first) “any person entitled *in possession* in fee-simple, or in tail or quasi in tail,” and (secondly) “any person who has a power of appointing or disposing of the fee,” etc. It would appear *prima facie* that the definition of “owner” in section 1 of the Landed Estates Court Act as “any person beneficially entitled *in possession*” would, in the case of a petition for sale, under sections 43 or 44, have denied the right to present such a petition to any person not entitled “*in possession*.” Nevertheless, it is now well settled that persons entitled in reversion, or in remainder, or to a contingent estate, are not excluded from the right to petition for sale under sections 43 or 44. This principle was made clear for the first time by *In re Batty* (1), in which Christian, L. J., said :—“I could not follow at all the argument that was advanced here, that the Landed Estates Court can

(1) Ir. R. 6 Eq. 469.

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sell nothing but estates absolute and in possession. I have no doubt whatever that it can sell reversions or remainders; nor do I see anything in the Act to exclude from its jurisdiction estates defeasible on a contingency, in case the owner of such an estate or an incumbrancer upon it should ask for a sale. But whether it would be expedient to exercise the jurisdiction in such a case would be a question of circumstances." That case settled all doubt as to the jurisdiction to *sell* reversions and remainders:—Madden and Jellett's Land Judges, p. 4. If the same principle is applicable to a petition for a declaration of title as to a petition for sale, and having regard to the terms of section 53 of the Landed Estates Court Act, this is so; then, on the authority of Christian, L. J. (*supra*), the Court has jurisdiction in the present case to make a declaration of title in favour (first) of the tenant for life in possession, Mary Anne Kenny; (secondly) of the tenant for life in remainder expectant on the determination of the life estate of Mary Anne Kenny, namely, Michael Edward Kenny, and in favour of his issue on the determination of his life estate; and (thirdly) in favour of the persons entitled to a contingent reversion in default of issue of Michael Edward Kenny.

The question whether the Court will or will not exercise the jurisdiction, either to sell or declare the title, is, as Christian, L. J., said *In re Batty* (1) (so far as a sale was concerned), one of expediency; indeed this is expressly provided by section 53. There is no doubt that where a petitioner who is *not* in possession seeks a declaration of title in order to oust one who *is* in possession, then the Court would not consider it "expedient" to exercise the jurisdiction given to it by section 51. Upon this principle declarations of title were refused: *In re Carson* (2) and also *In re Netterville* (3). In the present case, however, it is "expedient" to exercise the jurisdiction, because here there are no contentious claims, and there is no attempt to oust anyone in possession; the title is vested in the one family, all the petitioners claiming under the same settlement, and each subject to the rights of the others.

(1) I. R. 6 Eq. 469.

(2) I. R. 4 Eq. 555.

(3) Ir. R. 3 Eq. 504.

Ross, J. :—

Mr. Carroll has argued that inasmuch as the definitions of "owner" in sect. 1 of the Landed Estates Court Act, 1858, and in sect. 2 of the Record of Title Act, 1865, are practically the same; and that as the owner of an estate like that vested in Michael Edward Kenny and the other petitioners could have a sale, they are also entitled to a declaration of title.

Since the argument a search in the office has been rewarded by finding that in *The Estate of Monica Purcell* (1) a declaration of title was made to an estate in remainder. Independently of this case, Mr. Carroll convinced me that he was right. However, there being a precedent which was fully considered by my learned predecessor, I have no difficulty in making an order on the petition.

Solicitors for the petitioners : *Meldon & Co.*

W. G.

IN THE MATTER OF THE ESTATE OF WILLIAM RYAN
AND REV. JOHN GROGAN, TRUSTEES FOR SALE UNDER
THE WILL OF THE REV. CHARLES JAMES GROGAN,
OWNERS AND PETITIONERS.

Ross, J.
1897.
Feb. 26.

*Land Law (Ireland) Act, 1896, section 31, sub-sections (1), (8)—Sale to tenants
—Superior interests—Contingent liability.*

The fee-simple of land may be vested in tenant purchasers under section 31 (1) of the Land Law (Ireland) Act, 1896, subject to a contingent liability; as for instance, where the lands sold are subject in conjunction with others to tithe rentcharge or quit-rent, but adequately indemnified by the latter against liability.

THE sale of the estate in this matter having been advertised for the 30th October, 1896, was adjourned by the Court for the purpose of obtaining a report from the Irish Land Commission

(1) Unreported.

Ross, J. under sect. 40 of the Land Law (Ireland) Act, 1896 (1). A
 1897. request under the section was issued on the 10th November, 1896,
In re and the report of the Land Commission, made on the 15th
 GROGAN'S January, 1897, now came on for the consideration of the
 ESTATE. Land Judge. The sale, as advertised in October, 1896, was
 subject to the following, amongst other, printed conditions of
 sale:—

“The parts of the lands of Ballinvegga and Gobbinstown, for sale in this matter, form part of ancient denominations, which are with other lands charged with a reduced quit rent of £11 1s. 6½*d.* Said quit rent is paid by Mr. A. H. Tyndall, and no part thereof is contributed by the parts of the lands for sale in this matter. And the said part of the lands of Gobbinstown also forms part of an ancient denomination, which is charged with the respective quit rents of £3 14s. 9*d.*, 18s 8*d.*, and 3s. 1½*d.* The said quit rents are paid by the said Mr. A. H. Tyndall and Mr. T. Kough, and no part thereof is contributed by the part of the said lands of Gobbinstown, for sale in this matter.

“The part of the said lands of Gobbinstown for sale in this matter, is, with the remaining portion of Gobbinstown not for sale in this matter, subject to an annual tithe rentcharge of £21 8s. 2*d.*, payable to the Irish Land Commission. The entire of said tithe rentcharge is paid by the Misses Fitzhenry, and no part thereof is contributed by the estate for sale. The purchaser shall not object if at any time hereafter the lands now for sale should be made liable for any part of the said quit rents or tithe rentcharge.”

Prior to the advertised sale six out of the seven tenants on the estate had agreed to purchase their holdings, subject to the printed conditions of sale, at sums equal to eighteen years' purchase of the existing rents, if the Land Commission should make the necessary advances. The Land Commission reported that these were prices at which sales to the tenants could properly be made, and that the advances would be adequately secured without the retention of guarantee deposits. The owners and the tenants were all anxious to carry out the sales on these terms, but the

owners expressly required that the sales should be made subject to the printed conditions, and objected to being obliged to extinguish the contingent liability to quit rent and tithe rentcharge. The tenants were willing to purchase subject to these conditions.

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Matheson, Q.C., and *C. R. W. Brady*, for the owners, referred to sect. 31, sub-sects. (1) and (8) of the Act. The words in sub-sect. (1) "discharged from all superior interests as defined by this section, or from *any of them*," imply that a sale may be made subject to some superior interests. In *Butler's Estate* (1) *Bewley, J.*, recognized that this was so, although he held that the interpretation of the term in that case to secure the contingent jointure rendered it impossible to vest the fee-simple in the tenants without getting rid of the jointure. That case turned entirely on the existence of the term.

T. J. Healy, solicitor, appeared for the tenants.

Ross, J. :—

My view of the section always has been (though I cannot say that it is clear) that the words "or from any of them," leave it in the power of the Court to redeem some only of the superior interests mentioned, and that I can vest the fee-simple in the tenants subject to the contingent liability to quit rent and tithe rentcharge.

Solicitors for the owners : *T. T. McCredy & Sons*.

Solicitor for the tenants : *Healy*.

W. G.

(1) 31 Ir. L. T. 85.

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MAYNE v. MAYNE.

(1895. No. 528.)

Will—Words—“Ready money in bank”—Deposit receipts—Notice of withdrawal.

A gift of “ready money in bank,” *held* to include money on deposit receipt, which could be withdrawn without previous notice to the bank ; otherwise, if previous notice was necessary.

A testatrix, by her will made in 1864, directed that as regards whatever ready money might be found in bank, or interest accruing at the period of her decease, after payment of any just debts, of rent, etc., and the defrayment of a plain, respectable funeral, the surplus should be divided, if worth division, between certain charitable societies. The will contained no residuary bequest.

The testatrix died in 1893, intestate as to a large portion of her assets, which included considerable sums on deposit receipts in various banks. She had no current account at any bank. Notice of withdrawal was necessary as regards some of the deposit receipts, but not as regards others.

Held, that the deposit receipts, as to which no notice of withdrawal was necessary, passed to the charities as “ready money in bank,” but that the deposit receipts as to which notice was necessary were not “ready money,” and being undisposed of went to the next-of-kin.

FURTHER CONSIDERATION.

This action was brought to carry out the trusts of the will of Marianne Mayne, dated the 31st May, 1864, and to administer her personal estate.

The testatrix died at Kingstown, in the county of Dublin, on the 22nd May, 1893, intestate, as was then believed, leaving the plaintiffs, William Gibbons Mayne, and Beatrice Elizabeth Barker, and the defendants, Robert S. St. George Mayne and Margaret Catherine Mayne (all children of her deceased brother, the Rev. W. G. Mayne), her sole next-of-kin her surviving.

Immediately after the death of Marianne Mayne the plaintiffs made diligent search and inquiries to ascertain if the deceased had made any will, but the plaintiffs were unable to discover any such will, and accordingly, on the 20th June, 1893, letters of administration to the personal estate and effects of the

deceased were granted to the plaintiffs out of the Principal Registry of the Probate and Matrimonial Division of the High Court of Justice in Ireland. The letters of administration were resealed in England on the 20th July, 1893.

Marianne Mayne, at the time of her decease, was possessed of or entitled to personal estate of considerable value, amounting in value to the sum of £16,351 1s. 7*d.*, or thereabouts, part whereof, amounting in value to £10,595 15*s.* 10*d.*, was situate in Ireland, and the balance whereof, amounting in value to £5755 5*s.* 9*d.*, was situate in England. The particulars of such personal estate, and the investments representing the same, at the time of the death of the said Marianne Mayne, were set forth in the schedule to the statement of claim, from which this statement of facts is taken. The plaintiffs having duly published the usual statutory notices for creditors, and having paid the funeral expenses and debts of the deceased, and costs and expenses of the administration of the said estate, and the duties payable to the Crown in respect of the said assets, in or about the month of April, 1894, divided the residue of such personal estate amongst the plaintiffs and defendants, as such next-of-kin, in equal shares in the manner set forth in the said schedule. Marianne Mayne was not entitled to any real estate at the time of her death.

On the 7th December, 1894, Messrs. Wade and Son, as solicitors for the plaintiffs, received a letter from Mr. W. G. Armstrong, solicitor, dated the 6th December, 1894, stating that he had a will of the said Marianne Mayne, dated the 31st May, 1864, under which she left money to five charities—The Jews, Irish, Irish Church Missions, Church Missionary Society, and the Continental Society, and he was instructed on behalf of the Societies to take steps to have the will proved, and asking the plaintiffs to bring into Court the letters of administration granted to them. This was the first intimation or knowledge the plaintiffs had of the existence of such a document.

By the said will, dated the 31st May, 1864, the said testatrix gave to her dear friend, Charlotte Young, therein described, the use and yearly interest arising from the sum of money remaining in her name at that time in the New 3 per cent. Government Stock of the amount transferred to the said testatrix by the will

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of her late beloved mother, also the yearly interest arising from the sum invested in the name of the testatrix, or which might thereafter be invested in Bank of Ireland Stock, for the benefit of herself, the said Charlotte Young, and unmarried daughters residing with her, and in case of her death to be enjoyed by the said unmarried daughters while unmarried and resident together in either of the British Isles, to the last survivor of them so located, at whose death the principal vested in the above stocks to fall to the then infant niece and godchild of the testatrix, the defendant Margaret Catherine Mayne, and to her lawful children after her, especially daughters, and in case of her dying childless, to the defendant Robert S. St. George Mayne; and to her friends Marianne and Frideswide L'Estrange the testatrix bequeathed the joint use of the annual interest proceeding from the shares which she then held of the Provincial Bank of Ireland, to be enjoyed for life by either survivor in case of the demise of her sister; also to the testatrix's dear young friends, William Henry Beeche, and Matilda Shepherd, therein respectively described, the testatrix bequeathed the use, share and share alike, of the annual interest arising from her then present investment in the Belfast Banking Company, the latter for the term of her unmarried life, the former for that of ten years from the period of the death of the said testatrix, for the purchase of books or otherwise to assist in forwarding his preparation for the ministry, or else towards the education of his younger brother and sister, separate drafts to be supplied by the bank to each party to the amount of half the interest, for the greater convenience when drawn, the Belfast Banking Company's shares from which such income should have been derived to pass, at the termination of the respective periods stipulated, to the testatrix's godchild, the defendant Margaret Catherine Mayne, and ultimately, as before specified, to her children or brother; also the Provincial Bank shares to fall, at the demises of the Misses L'Estrange, to her godchildren in succession, Harriet Catherine Young, therein described, and the defendant Margaret C. Mayne, afterwards to her children or brother, as in the former cases; and the testatrix further bequeathed to Charlotte Young aforesaid the entire of her household goods, and the reversion to the afore-mentioned daughters, to be

preserved for their mutual enjoyment, and particularly as remembrances to her godchild; and in each and all of the above legacies the testatrix desired it distinctly understood that they were left altogether without the control of husband, father, or brother, and beyond the reach of creditors.

Her watch, and whatever jewellery and plate the testatrix was possessed of, having belonged to her dearest mother, she bequeathed to her namesake and grandchild, the defendant Margaret Catherine Mayne, and her lawful children after her, as named by their mother; and as regards whatever ready money might be found in bank, or interest accruing at the period of her decease, after the payments of any just debts, of rent, &c., and the defrayment of a plain, respectable funeral, the testatrix desired the surplus to be divided, if worth division, between the Jews, Irish, Irish Church Missions, Church Missionary, and Continental Societies, and forwarded simply as the contribution of "M. C. M."

The said testatrix did not by her said will make any residuary bequests, or name any person as her residuary legatee, but died intestate as to a large portion of her assets.

On the 28th of January, 1895, an action was instituted in the Probate and Matrimonial Division of the High Court of Justice in Ireland, wherein the Rev. Maurice Neligan and others were plaintiffs, and the plaintiffs herein were defendants, by the plaintiffs therein as legatees under the said will, dated the 31st of May, 1864, of the said Marianne Mayne, to have the grant of administration of the personal estate of the said deceased obtained by the plaintiffs herein as aforesaid revoked, and a grant of administration, with the said will of the said Marianne Mayne, deceased, annexed, granted to the plaintiffs in the said action.

The said action came on for hearing on the 27th day of April, 1895, before the Right Hon. Robert Warren, the President of the Probate and Matrimonial Division of the High Court of Justice in Ireland, and by a judgment of the same date the said President pronounced for the force and validity of the said last will of Marianne Mayne, deceased, bearing date the 31st day of May, 1864, propounded in the said action on behalf of all the plaintiffs therein, and ordered the plaintiffs and defendants therein entitled to their costs of the said action out of the assets of the said deceased,

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and further ordered that the said letters of administration of the goods of the said deceased, granted to the plaintiffs herein on the 20th of June, 1893, should be cancelled, and that the plaintiffs herein should be at liberty to take out administration with the said will annexed of the goods of the said deceased, upon giving justifying security.

In pursuance of the provisions of the said order, letters of administration (with the said will, dated the 31st day of May, 1864, of the said Marianne Mayne, deceased, annexed) of all the personal estate of the said deceased were, on the 3rd day of July, 1895, granted forth of the Principal Registry of the Probate and Matrimonial Division of the High Court of Justice in Ireland to the plaintiffs in this action.

The said Frideswide L'Estrange died on the 12th of July, 1872; and the said Mary Anne L'Estrange died on the 4th of April, 1883; and the said Matilda Shepherd died on the 8th of January, 1889; and the said William Henry Beeche died on the 21st of February, 1892. The plaintiffs believed that the said Charlotte Young and the said Harriet Catherine Young, other legatees named in the said will, predeceased the said Marianne Mayne, but the plaintiffs were unaware as to the dates of their deaths.

The plaintiffs were advised that serious and difficult questions of law arose upon the construction of the several bequests contained in the said will, and as to the persons now entitled to the same respectively, and in particular as to what passed and what charities or societies were entitled under the bequest of "whatever ready money may be found in bank, or interest accruing, at the period of my decease, after payment of any just debts of rent, &c., and the defrayment of a plain, respectable funeral, I desire the surplus to be divided, if worth division, between the Jews, Irish, Irish Church Missions, Church Missionary, and Continental Societies," and the plaintiffs were further advised that they could not safely administer the said estate save under the direction of the Court.

The plaintiffs were ready and willing to refund and pay into Court such portion of the assets of the said testatrix so retained by them as such next-of-kin as aforesaid, as upon the true construction of the said will the Court, should consider necessary and

proper. And the plaintiffs submitted that the defendants should be directed to refund such portion of the said assets received and paid to them as such next-of-kin by the plaintiffs as aforesaid as upon the true construction of the said will to the Court should seem fit.

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The plaintiffs submitted that they were entitled to retain or have credit in their accounts for all payments and disbursements of the said assets in respect of debts, funeral and testamentary expenses, duties and costs, made by them in the due course of administration of the said estate prior to the said order of the 27th day of April, 1895, revoking the said grant of letters of administration made to them on the 20th day of June, 1893.

The defendants admitted the above facts, and stated that they were ready and willing to refund and pay into Court such portions of the assets of the deceased received by them, as upon the true construction of the will the Court should consider proper.

The money on deposit receipt at the date of the death of the testatrix was as follows:—Bank of Ireland, £370 14s. 3d.; Royal Bank of Ireland, £5208 9s. 7d.; Provincial Bank of Ireland, £581 19s. 2d. These deposit receipts were cashed, and the amounts received were distributed amongst the next-of-kin. The deposit receipts were in the following forms:—

[COPY FRONT OF DEPOSIT RECEIPT.]

BANK OF IRELAND.

No. 22932.

13th September, 1867.

£22 5s. 0d.

RECEIVED from Mary Anne Mayne, Twenty-two Pounds, Five Shillings, sterling, to the credit of her Deposit Account with the Bank of Ireland.

By order of the Board.

For instructions respecting this Deposit receipt see other side.

[COPY BACK OF DEPOSIT RECEIPT.]

This receipt must be produced at the Bank when payment is required either of the principal or of the interest due thereon, and the person in whose favour it is issued must sign it. The rate of interest is subject to the alteration, notices of which will be posted up in the Bank and its Branches.

Interest will not be allowed on Deposits withdrawn within a month.

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[COPY FRONT OF DEPOSIT RECEIPT.]

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BANK OF IRELAND.

25th January, 1883.

£35 11s. 4d.

RECEIVED from Mary Anne Mayne, Thirty-five Pounds, Eleven Shillings, and Four Pence, sterling, to the credit of her Deposit Account with the Bank of Ireland.

By order of the Board.

[ALSO ON FRONT OF DEPOSIT RECEIPT.]

This receipt must be produced at the Bank when payment is required either of the principal or of the interest due thereon, and the person in whose favour it is issued must endorse it. The rate of interest is subject to alteration, notice of which will be posted up in the Bank and its Branches. Interest will not be allowed on deposits withdrawn within a Month.

[COPY FRONT OF DEPOSIT RECEIPT.]

Not Transferable.

No. PROVINCIAL BANK OF IRELAND, LIMITED.

£

18

RECEIVED from
the sum of

To be accounted for at our Office here.

For the

PROVINCIAL BANK OF IRELAND, LIMITED,
Manager.

Acct.

Provincial Bank of Ireland, Ltd.

[COPY OF BACK.]

CONDITIONS ON WHICH DEPOSITS ARE RECEIVED AT THE BRANCHES OF THE PROVINCIAL BANK OF IRELAND, LIMITED.

1. *On Current Accounts.*—Parties desiring to lodge Money on such Accounts must be respectably introduced and furnish their signatures to the manager. Balances at their credit may be drawn out in part or whole at their pleasure by cheques without previous notice; but no over-drafts are permitted. No interest is allowed on these accounts. The Pass Books are made up, or copies of the Accounts rendered by the Bank, at its half-yearly Balances, at the end of June and December. The Accounts should be settled at each of those periods, and after the Balance in December the Vouchers should be exchanged

and the correctness of the Balance acknowledged by a docquet in the Bank's Books, signed by a holder of the Account, or by another party duly authorized.

2. *On Deposit Receipts.*—Sums deposited for one month or longer, bear interest at the rate allowed by the Directors on such Deposits for the time. Notices of the rate allowed and of any variation thereof are put up from time to time in the Public Offices of the Bank, and other notice regarding interest will not be given to any Depositor. Ten days notice previous to withdrawal is required to be given either by Depositor, or by Survivors or survivor of persons named in Receipt. When Payment, either of Principal or interest is desired, the Deposit Receipt is required to be produced and delivered up to the Bank duly discharged.

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[COPY FRONT OF DEPOSIT RECEIPT.]

THE ROYAL BANK OF IRELAND, LIMITED,
FOSTER PLACE, DUBLIN.

RECEIVED from
to the credit of
with the Royal Bank of Ireland, Limited.

Deposit Account

Secretary.

[COPY BACK OF DEPOSIT RECEIPT.]

NOTE.—No Cheque can be drawn against this Receipt, but when the amount or any part thereof is required, the Receipt itself must be produced at the Bank by Depositor, duly endorsed, and no interest will be allowed unless the Deposits remain One month undisturbed.

Depositors must give seven days notice of withdrawal.

Any variation in the rate of Interest will be published in the Cash Office of the Bank, but no other notification will be given.

Matheson, Q.C., and J. Herbert Shaw, for the plaintiffs.

Frederick Fleming, Q.C., and Jefferson, for the Charitable Societies.

R. E. Meredith, Q.C., and J. W. Richards, for the defendants.

THE MASTER OF THE ROLLS :—

This case comes before me on further consideration, but I have to give my decision on only one question, which arises on the construction of the will of Marianne Mayne. The question turns mainly on one clause in the will. It deals with certain specific

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property, namely, New 3 per cent. Government Stock, Bank of Ireland Stock, shares in the Provincial Bank, and in the Belfast Banking Company, all of which she puts in strict settlement. She bequeaths her household goods to Charlotte Young; her watch, jewellery, and plate she bequeaths to her grandchild, the defendant Margaret Catherine Mayne, and her children after her as named by their mother. Then comes the clause in question:—
“As regards whatever ready money may be found in bank, or interest accruing at the period of my decease, after the payment of my just debts, of rent, &c., and the defrayment of a plain, respectable funeral, I desire the surplus to be divided, if worth division, between the Jews, Irish Church Missions, Church Missionary and Continental Societies, and forwarded, simply, as the contribution of M. C. M.”

The correct descriptions of the Societies intended and designated by these names have been ascertained by an inquiry. There is no residuary clause, though no doubt the testatrix thought that she was disposing of all her property, for she commences her will with the following words:—“I, Marianne Mayne, of Sandycove-terrace, Kingstown, being in sound mind, and impressed with a sense of the uncertainty of this life, therefore desirous of having my worldly affairs settled, and that whatever property I am possessed of shall fall into the hands of those friends whom I esteem and love.” In no view of the case, however, did she dispose of everything she had, because all the interests she dealt with before the gift of ready money in bank were specific, and there is a good deal of property which is not mentioned at all. It may be noticed, that she says, “being in sound mind,” not sound body. She may, probably, have been ill at the time the will, which was witnessed by a doctor and a clergyman, was made, and this may account for her not enumerating everything she had. This gift, which I have read, would not even pass ready money elsewhere than in bank, nor money so situated that it could not be called *ready* money, nor any investment of money in stocks, shares, bonds, or mortgages. Of such securities she had considerable amounts at the time of her death. It is, in short, a specific, and not a residuary gift; the question is, what is covered by it?

Before considering the decisions on similar wills, it is necessary to bear in mind the facts of this particular case. Miss Mayne died on January 22nd, 1893, just about twenty-nine years after she made her will, which, as I have said, was witnessed by a doctor and clergyman, and may have been prepared during illness. That her property vastly increased there can be no doubt. Her property is set out in the Schedule to the Chief Clerk's Certificate. [THE MASTER OF THE ROLLS here referred to the list of stocks in the Schedule.] I have not been referred to any evidence showing when she acquired each of these stocks; but as to all, except those specifically bequeathed, the internal evidence would lead one to believe that probably she bought or inherited them after the will was made. It does not appear that she ever had a current account in any bank, though it is not impossible that she may have had one in 1864. None has been traced; but, even if she had no such account, she may have intended opening one. I feel pretty sure that she never had such an account, from the way in which she dealt with her deposits (she used to take a deposit receipt to the bank, cash it, keep as much as she required, and reldodge the balance), and I should be prepared to find this as a fact upon the evidence.

Previous to the date of the will she had been possessed of money on deposit receipt in the Royal Bank of Ireland, in Dublin, to the extent, in all, of some £90 principal, or thereabouts, comprised in seven separate lodgments. All of these, with whatever small amount of interest was due on them (the first of them was lodged in October 31st, 1860, and last in February, 1863), were drawn out at the same time, that is, upon August 3rd, 1863. From that time till October 9th, 1866, she had no money, whether upon deposit or otherwise, in any bank, so far as is known. On that date she deposited £12 12s. 7d. on a deposit receipt in the Bank of Ireland, in which she continued to make such lodgments from time to time, down to January 25th, 1883. These were all drawn out after her death by the personal representatives. Contemporaneously, that is, from September 2nd, 1867, till February 28th, 1893, she made repeated lodgments in the Royal Bank, in Dublin—143 at least, in number. Also, from January 24th, 1872, till July 28th, 1880, she lodged repeated sums on deposit

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in the Provincial Bank, and from March, 1874, she commenced lodging on deposit in the Kingstown Branch of the Royal Bank. The total amounts of all these deposit receipts outstanding at her death were, as found by the Chief Clerk's Certificate—Bank of Ireland, £370 14s. 3d.; Royal Bank of Ireland, Dublin, £5135 10s. 1d.; Royal Bank of Ireland, Kingstown, £75; Provincial Bank of Ireland, £581 19s. 2d.

The form of these deposit receipts varied. In the case of the Bank of Ireland, the body of the document is an ordinary receipt for money deposited; but there is at the foot a note referring to the other side for instructions. The indorsement on the other side states that the receipt must be produced to the bank for payment: but no other notice is needed previous to withdrawal. [THE MASTER OF THE ROLLS read the indorsement on one of the original deposit receipts.] In the case of the Provincial Bank there is no substantial difference in the body of the receipt, but it does not contain any reference to the back, and the receipt is complete in itself. There is, however, an indorsement on the back, in which it is stated that ten days' notice previous to withdrawal is required. [THE MASTER OF THE ROLLS read the indorsement on one of the original deposit receipts.] The Royal Bank deposit receipts are the same as those of the Provincial Bank, except in the case of the earlier receipts given, *e.g.* those given in 1863, ten days' notice was required, whereas in the case of the more recent receipts seven days only was required. [THE MASTER OF THE ROLLS here referred to the original deposit receipts.]

What is the effect of the stipulation as to notice? Notice may, no doubt, be waived, and probably is often waived. Mr. Mullally was examined, and said that the bank could insist on notice being given, but generally did not, though they could rely on it if they liked. It is part of the contract till waived; and a legal condition of the loan, *e.g.* if the testatrix had quarrelled with the bank and insisted on getting her money, and the bank had relied on want of notice, she would have been defeated had she brought her action without notice. Now, is money secured by these instruments "ready money in bank"?

Apart from authority, it is hard to see how money due by a bank, but secured by a contract rendering it legally irrecoverable

without a stipulated notice, whether seven or ten days, or any other time, can be ready money unless the required notice be given. It is money in bank no doubt, just as much as the balance of an account current. If she said, "I have £100 in the bank," the statement would be true in its ordinary acceptation, if she had the money on deposit receipt. But ready money is a different thing; and if the money in bank is not ready, *i.e.* legally available for present purposes at once, it is, to say the least, straining language to call it ready money. If the testatrix had shown by the will that by the phrase in question she meant deposit receipts, her intention would prevail, even though she obviously never dreamt of leaving £5000 or £6000 to the charities which now claim it. The excess of the amount above what may have been intended by the testatrix would not have prevented the clause from operating. In *Page v. Young* (1) the question arose as to what passed under the words "any small sum remaining in the bank after my funeral expenses are paid." The testatrix had at the date of her will a balance of £480 at her bankers, which had increased to £1373 0s. 10*d.* at her death. Malins, V.-C., held that the whole balance passed. At p. 505 he says:—"It is found that she had at the time of making her will a balance of £480 at her bankers, and if she had died the same day the balance, after payment of her funeral expenses, would have belonged to the plaintiff. It happened that she lived for some years afterwards, and the balance increased to £1373 0s. 10*d.*; and it is argued that because she has increased the balance the plaintiff must take nothing. I adhere to my former decision in *Hill v. Tate* (2), where it was argued that the expression used must refer simply to the small things about the testator. In my opinion I must reject the word 'small,' and read the clause as if it had run 'any sum remaining after payment of my funeral expenses.'" But no such intention appears on the face of this will, and, as I have shown, when she made it she had no deposit receipts or deposit account whatever, nor any money in bank at all.

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How then do the authorities affect the question? In *Hopkins v. Abbott* (3) bankers' deposit notes in a peculiar form were held

(1) L. R. 19 Eq. 501.

(2) Unreported.

(3) L. R. 19 Eq. 222.

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MAYNE *Malins, V.-C.*, there says at p. 228: "The case of *Stein v.*
r. *Ritherdon* (1), decided by me in 1868, has been cited. I there had
MAYNE. to decide the effect of the words 'ready money.' I held that it was intended to pass the money of the testator at his bankers on a drawing account, and on deposit at call at the time of his death, but not interest on mortgages or dividends on stock. Now what are the deposits in this case? I must hold it, as the bill states, that the testatrix had from time to time deposited money at her bankers to the amount of £600, and that she had taken a note in the shape of an acknowledgment of the receipt of the money which was to be accounted for. Now, as between the banker and the customer, the contract must be taken to depend upon the written document by which the banker acknowledges the receipt of a sum of money to be accounted for on demand, and if the customer, under such circumstances, were to overdraw his current account, and the banker were to dishonour a draft while he had money of his customer in his hands upon a deposit account, upon such a receipt as was given in this case, the banker would be liable to an action for damages." The receipt given in that case was "Received of Mrs. Elizabeth Badcock one hundred and fifty pounds, to account for on demand. Signed, J. Barratt." This case shows that "money" will include deposits in bank; but the Vice-Chancellor expressly limits his decision to the case of money payable *on demand*, and therefore answerable for the customer's cheques.

In *Stein v. Ritherdon* (1), the same Judge says:—"I think the question as to the money at the private bankers clear beyond all possibility of doubt. It is said that it did not pass by the gift of the ready money, because the trustees are afterwards directed to get in all debts and other money due and owing or otherwise payable to the testator at the time of his decease. But the will must be read so as to make every part of it agree, and the moneys which the trustees are to get in must mean other money than that which is given to the daughter. On authority, therefore,

as well as on principle, I think that the £104 at the private bankers passed under the description of 'ready money.' The only question is, whether there is any difference between that sum and the £750 on deposit. But it seems that no notice was necessary before drawing it out, and being liable to the testator's cheques whenever they might be presented, I think that also clearly passes under the description of 'ready money.'"

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In *Manning v. Pureell* (1), one of the questions which came before the Vice-Chancellor was, whether a balance of £2049, lying at the bankers of the testator, and moneys due to the testator at the time of his death upon the deposit notes of the London and Westminster Bank, to the amount of £2500, bearing interest, were included, and passed to the testator's widow absolutely under the designation of "moneys." It appeared that the notes were payable immediately, upon the mere indorsement of the testator, and presentation of them at the bank. The Vice-Chancellor decided that both the balance on current account and the deposit notes passed as moneys, and his decision was affirmed on appeal. The Vice-Chancellor there says (2): "My decision proceeds upon this, that as to the deposit notes, as much as to the current account, the relation of banker and customer exists; that the banker, holding money of a customer, whether on a deposit account or current account, unless there is some express contract to take it out of the ordinary case of deposit, holds it as money, and as money so readily accessible to the customer on the relation of banker and customer that it is held to pass under the description of money generally; and upon that ground I come to the conclusion that I should put a wrong interpretation upon what the testator describes in the will as his money if I held that he excepted from that description his money on deposit account at his bankers, and included the moneys on his current account." In the report of the case on appeal (3), Knight Bruce, L.J., says: "I have some doubt as to the other portion of the balance at his bankers, which could not be dealt with by ordinary cheques, but would have required some notice; my doubt, how-

(1) 2 Sm. & G. 284; 7 De G. M. & G. 55.

(2) 2 Sm. & G. 293.

(3) 7 De G. M. & G. 65.

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ever, is not so strong as to justify me in dissenting from what the Vice-Chancellor has decided in this respect." Turner, L.J., says, at p. 67: "There was, at the testator's death, a sum standing to his credit upon a deposit account with his bankers, for which he had taken a deposit note bearing interest. Upon this I have felt considerable doubt, and I think, that that also must be considered as 'moneys' of the testator, within the meaning of the will. The substance of the case is, that the testator had two distinct accounts at his bankers, the one a current account, and the other an account which he treated as a reserve fund, but which was not, therefore, the less his moneys."

In *Smith v. Butler* (1), "ready money" was held not to include a balance due on a salesmaster's account. Lord St. Leonards there says, at p. 566: "The decision that money in a banker's hands is ready money within the meaning of that phrase in a will, is, I think, correct. For in a common understanding it is considered as cash in hand. The banker, it is true, uses the money in his trade, but having always a floating capital, and the money being payable on the presentation of a check, I have always considered it clear that a gift of ready money included balances in the hands of a banker. It is now sought to carry the principle of these further, for it is argued that money in the hands of a salesmaster is ready money within that description in a will. Nothing could be more dangerous than to decide that it was so. If I were so to hold, where am I to stop? It would be impossible to distinguish the case from that of an ordinary agent."

In *Enohin v. Wylie* (2), "capital . . . in ready money and bank billets" was held not to include English Consols. Lord Chelmsford there says, at p. 25, using language applicable in another point of view to this case:—"We come then to the few words in the will upon which the question arises. We must of course bring to their interpretation the persuasion that the testator had begun his will with an intention of disposing of everything which he possessed. If then we had found in the will a description of portion of his property as 'ready money' without more, we might in deference to the evident intention of the

(1) 3 J. & L. 565.

(2) 10 H. L. Cas. 1.

testator to make a general disposition of all his property, have followed the decision of Vice-Chancellor Parker in *Waite v. Combes* (1), and have given a latitude of meaning to the words to make them comprehend stock in the English Funds. But when we find a bequest expressed in these terms, 'the whole of my capital which shall remain after my death in ready money,' I do not see how it is possible, without doing the greatest violence to language, to give them the enlarged meaning which has been contended for. Admitting to the fullest extent the duty of a court of construction to find out the intention of a testator, and to give effect to it when discovered, and not doubting that the testator had the general intention attributed to him, I am compelled to say that his object has been frustrated by his use of language of so specific a character as to be incapable of any other meaning than that which the words themselves convey."

Dividends due and not collected but for which the warrants had not been received are not ready money: *May v. Grave* (2); although these dividends accrued due on the public funds (3 per cent. Reduced Bank Annuities, and New $3\frac{1}{2}$ per cent. Annuities).

In *Parker v. Marchant* (3), it was decided that a balance in bank may pass as ready money. But it was a case of a balance on an account current, and is expressly so stated by the Lord Chancellor (Lord Lyndhurst) who says at p. 362:—"Sir Charles Wetherell, in his very able argument, suggested difficulties that might arise in particular cases, by considering the words 'ready money' in a will, as embracing the testator's balance at his bankers. Those circumstances would deserve to be considered by the Court, for the purpose of forming a conclusion as to what was the intention of the testator in the particular case in which they might happen to exist. But in the present case there is no such difficulty. The sums in question were balances upon ordinary banking accounts. It does not appear that any interest was payable upon them, or that they were subject to any limitation, restriction, or condition of any description; nor does it appear that

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(1) 5 De G. & Sm. 676.

(2) 3 De G. & Sm. 462.

(3) 1 Y. & C. C. 290; 1 Phill. 356.

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the sums, though large, were larger than the average sums usually kept at his bankers by this very wealthy individual; and therefore it is one of the plainest cases that can be conceived of an ordinary deposit at a banker's; and, considering it as such, I am of opinion for the reasons I have already stated, that the judgment of the Vice-Chancellor was correct." That is to say, Lord Lyndhurst held that there was no distinction between the balance at the bank and "ready money" in the ordinary meaning of the words.

In *Cooke v. Wagster* (1), Sir John Stuart held that under the words "ready money, securities for money, money in funds, and money in the bank or banks, if any," a sum of money in the hands of an agent to be invested, but not actually invested, passed as being the testator's "money." But the Vice-Chancellor decided definitely that it did not pass under the words "ready money," but by the wide and general words I have quoted. At p. 300 he says:—"It has, however, been contended that it passed as 'ready money'; but it is impossible to hold that it passed by such a bequest. My doubt, however, is upon reading the word relied upon in support of the claim with the context, whether, upon the plain interpretation of the word 'money' this money in the hands of Chambers' executors passed by this bequest. Reading the whole passage, in which the word 'money' four times occurs, I think it fairly bears the interpretation which the plaintiffs' counsel put upon it. They contend, with much force, that the testator intended to pass all his money, whether invested or uninvested, whether ready money or money in the funds or in the bank, or due and owing to him. It is difficult to ascertain what money of his he could have intended to leave undisposed of when he so frequently made use of the word 'money.' In the present case, where the word is so often repeated, I think that the money in question, which was a sum dedicated to investment upon security, and not a floating balance of an account, passed upon the plain interpretation of the will."

. That is not a very satisfactory judgment, if correctly reported, as the Vice-Chancellor does not say under what words the fund in

question did pass. In *Langdale v. Whitfield* (1), "moneys" were held to include not only money in hand, but money due to the testatrix, but the will referred to money of or to which she might be possessed or entitled.

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If the words "ready money" have a different signification from money itself, as no doubt they must, there must be some things answering to the description of money which are not ready money. But even under the word "money" it has never been held without a special context that money lodged on deposit receipt, bearing interest and not withdrawable without notice, would pass; and *a fortiori* money, to get at which ten days' notice must be given, is not properly "ready money." It will not be ready for ten days. A balance in the hands of a banker on foot of a current account, or a sum deposited on the terms that it may be drawn against or withdrawn at any time without notice (as in *Hopkins v. Abbott* (2)), may be called the customer's money, or his ready money, though of course the banker does not hold the fund *in specie* as a trustee, but is rather in the position of a debtor in respect of being bound to pay when called on. But when the bank is not bound to pay on demand, it is straining language to call it ready money. It makes no difference that the notice may often or usually be waived.

There is nothing in the present case to require such a strain. The testatrix never dreamt of leaving £6000 or so to these charities. If they were entitled to capture it, it would be a mere accident, wholly independent of the intentions of the testatrix.

It is therefore to be collected from the cases that apart from an explanatory context a sum of money deposited with a banker will pass under a gift of "ready money" in a will, provided that it can by the terms of the contract be drawn out without notice, and rendered immediately and unconditionally available for the depositor. No case decides that money upon deposit, for the withdrawal of which seven or ten days' notice is needed, can be classed as ready money without some definite indication of intention to that effect. I am of opinion that deposits so situate are not ready money. The waiver by the bank of their right to

(1) 4 K. & J. 426.

(2) L. R. 19 Eq. 222.

M. R. notice in some cases cannot alter the contract in cases where no
1896. waiver has been shown.

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MAYNE. I am, therefore, of opinion that the deposit receipts of the
Bank of Ireland pass to the charities under the will, but that the
deposits in the other banks are undisposed of.

Solicitors for the plaintiffs: *Wade and Son.*

Solicitors for the defendants: *Reeves and Sons.*

Solicitor for the charitable societies: *W. G. Armstrong.*

W. L.

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*Will—Marriage with consent of testatrix—Legacy charged on real estate—
Time for raising charge.*

A legacy charged on the real estate of a testatrix, conditional on the marriage of the legatee with the sanction of the testatrix, does not fail because the performance of the condition has become impossible by reason of the death of the testatrix before the marriage of the legatee: the condition being applicable only in the event of marriage in the lifetime of the testatrix.

A testatrix by her will, made in 1867, pursuant to a power, gave to her sister a life annuity or rentcharge of £75, to be increased to £100 in the event (which happened) of her sister surviving her mother, to whom she had given a life annuity of £75, and if her sister should marry with her sanction and approval, the testatrix charged all her estates with a sum of £2000 for the child or children of such marriage, in such shares as her sister should by deed or will appoint, to be raised off her estates for the said child or children on their attaining age, and not to bear interest during the lives of her mother or sister, or the survivors of them, but to bear interest at five per cent. immediately on the death of her mother or sister, it being her intent that the said charge should not bear interest while the said annuities devised by her should be in force. The testatrix then gave all her freehold and personal property to her husband, and appointed him sole executor and residuary legatee.

The testatrix died in 1870, and her husband entered into possession of her real and personal estate. The sister of the testatrix married A in 1872. There were several children of the marriage. The mother of the testatrix died in 1883.

In 1895 the sister of the testatrix appointed by deed the said sum of £2000 to her eldest daughter B, who had attained age. B thereupon brought an action against the husband of the testatrix, to have it declared that the sum of £2000 was well charged on the real and personal estate of the testatrix, and to enforce payment thereof by sale or by a receiver.

Evidence was given at the trial that the sister of the testatrix had become engaged to be married to A during the lifetime of the testatrix, and that the testatrix had approved of the engagement:—

Held, (1) that, on the construction of the will, and in the event which happened, the sanction and approval of the testatrix was not necessary; (2) that, even if such sanction and approval was necessary, it had been

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given by the testatrix; (3) that the sum of £2000, though well charged on the real and personal estate of the testatrix, was not raisable until after the death of the surviving annuitant.

TRIAL OF ACTION.

The will of the testatrix and the facts as stated in the statement of claim were as follows:—

Elizabeth Corbet, of Spring Farm in the county of Wicklow, on the 14th day of December, 1867, duly made her last will in the words and figures following:—

“I, Elizabeth Corbet, otherwise Dunlevie, of Spring Farm, in the county of Wicklow, wife of William Joseph Corbet, of Spring Farm, aforesaid, esquire, do by virtue of a power to me in that behalf given before my inter-marriage with my said husband in and by a certain indenture bearing date the seventh day of August, 1865, make and publish my last will and testament, that is to say, I do hereby give and bequeath unto my mother, Elizabeth Jennings, during the term of her natural life one annuity or clear yearly rentcharge of £75 for her sole and separate use, independent of her husband, and for which her receipt alone shall be a sufficient discharge, and in the event of my said mother surviving my sister, Georgina Jennings, my will is that the annuity hereinbefore devised to my said mother shall be increased from £75 to £100 during her life for her sole and separate use as aforesaid. I do hereby give, devise, and bequeath to my sister, Georgina Jennings, during the term of her natural life one annuity or clear yearly sum of £75 for her sole and separate use, independent of any husband she shall marry, and for which her receipt alone shall be a sufficient discharge, and in the event of my said sister surviving my said mother my will is that the annuity hereinbefore devised to my said sister shall be increased from £75 to the sum of £100 during her life for her sole and separate use as aforesaid, and if the said Georgina Jennings should marry with my sanction and approval, I hereby charge all my estates with a sum of £2000 to and for the child and children of such marriage in such shares and proportions as my said sister shall by deed or will duly executed appoint, said sum of £2000 to be raised off my estates for said child or children on their attaining the age or ages of 21 years

respectively, and my further will is that said charge shall not bear any interest during the lives of my said mother or my said sister or the survivor of them, and that immediately upon the death of my said mother or said sister said charge of £2000 shall bear interest at the rate of £5 per centum per annum, it being my true will and intent that said charge shall not bear interest while the annuities hereinbefore devised by me shall be in force, and in the event of my said sister dying without leaving children her surviving, who shall attain the age of 21 years, then my will is that my said sister shall have power, if she so desires it, to appoint the interest which shall accrue upon said charge to her husband during the term of his natural life, and upon the death of the husband of my said sister my will is that said charge of £2000 shall fall into and be considered as part of the residue of my estate subject to the foregoing legacies, and to my just debts. I hereby give and bequeath all my freehold and personal property of what nature and kind soever and wheresoever situate unto my husband, William Joseph Corbet, to hold the same unto him, his heirs, executors, administrators, and assigns, according to the nature thereof respectively, for his own absolute use and benefit, and I appoint my said husband sole executor and residuary legatee of this my last will and testament."

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Elizabeth Corbet died on or about the 21st day of April, 1870, without having altered or revoked the said will, and probate thereof was on the 18th day of May, 1870, duly granted to the said William Joseph Corbet.

Georgina Jennings was on the 10th day of January, 1872, married to Francis George Adye Curran, and there was issue of the said marriage surviving eight children, of whom one was the plaintiff. The plaintiff attained the age of twenty-one years on the 1st day of May, 1895. The said Elizabeth Jennings in the said will named died on the 3rd day of May, 1883.

By deed bearing date the 11th day of November, 1895, the said Georgina Adye Curran, otherwise Jennings, in exercise of the powers for the purpose given her by the said will as aforesaid, appointed the sum of £2000 charged as aforesaid in favour of the plaintiff, and declared same to be a vested interest in the plaintiff immediately upon the execution of the said deed.

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Elizabeth Corbet died possessed of considerable personal estate, and also of real estate and chattels real, situate in the counties of Wicklow and Tipperary, and in the county and city of Limerick, to wit, amongst others the townlands of Killeady and Galboully, situate in the county of Limerick, a dwellinghouse in Castle-street, and two dwellinghouses in Flag-lane, parish of St. Mary and city of Limerick, the town and lands of Park, in the parish of St. Patrick's, liberties and city of Limerick, the town and lands of Ballygibba, containing about 210 acres in Irish plantation measure, situate in the barony of Coshma, county of Limerick, the lands of Rockville with their subdemesnes, in the barony of Owilly and Arra, in the county of Tipperary, the lands of Spring Farm, being the lands of Kilquade and Bulford, barony of New-castle and county of Wicklow.

Since the death of Elizabeth Corbet, the defendant had been in sole possession of all her real and personal estate. The defendant was requested to pay to the plaintiff the said sum of £2000, but failed to do so.

The plaintiff claimed—1. That the sum of £2000, and interest thereon from the 11th day of November, 1895, might be declared to be well charged upon the said real and personal estate of the said Elizabeth Corbet, deceased, and devised and bequeathed by her to the defendant, and that payment of same to the plaintiff might be enforced by a sale or by the appointment of a receiver; 2, that if necessary the real and personal estate of the said Elizabeth Corbet might be administered by the Court.

The defendant by his statement of defence (paragraph 5), pleaded that Georgina Jennings did not marry with the sanction and approval of the testatrix, and submitted that such sanction was a valid and subsisting condition precedent to the charge of £2000 and the raising thereof out of the said lands.

The defendant further submitted (paragraph 6) that, in case it should be held the said sanction and approval were not a condition precedent, or that the said charge was raisable, all the children of the said Georgina Jennings, otherwise Curran, had not attained twenty-one years of age, and that on the true construction of the will the said sum of £2000 was not raisable until such event. This contention was given up.

The defendant further submitted (paragraph 7), that the alleged charge of £2000 was not raisable until after the death of the said Georgina Jennings, otherwise Curran, in the will mentioned ; and that on the true construction thereof the same was not raisable and did not bear interest until after the said event, or at all during the existence of either of the annuities in the said will mentioned.

The action came on for trial on November 25th, 1896, and Doctor Francis George Adye Curran and Georgina Curran his wife (formerly Georgina Jennings), the father and mother of the plaintiff, were examined on her behalf. Mrs. Curran stated as follows :—“ My sister married Mr. Dunlevie ; I lived with her at Spring Farm for several years ; I recollect Mr. Dunlevie’s death, and Mr. Corbet afterwards paying his addresses to my sister. Mr. Corbet brought Dr. Curran (who was then a medical student) with him to Spring Farm, and introduced him to me ; we were all on very intimate terms, and used to go to picnics and excursions together. This intimacy continued till my sister married Mr. Corbet, and afterwards. On her marriage my mother and I went to live in Gardiner-street. I used often go to Spring Farm on the occasion of a picnic, and to stay on a visit. I constantly met Dr. Curran there ; he was a welcome visitor ; my sister used to call him by his Christian name. He proposed to me on the occasion of a picnic from Spring Farm in the summer of 1867, and I accepted him. I did not tell my sister until after he was qualified. She seemed very pleased, but said I was not to mention it to Mr. Corbet. Mr. Corbet had spoken to me about marrying some one else ; we were married in January, 1872. Mr. Corbet gave the wedding breakfast, and gave me away. He never told me that I was marrying without my sister’s consent. He always praised my husband.

“ My mother and I lived in Gardiner-street for three years from the year 1865. I used to go to Spring Farm on visits. I was there several times before my sister died. I do not remember any quarrel between my mother and sister ; my mother and Mr. Corbet could not agree. She had no income of her own, and my sister provided an income for us. I first told my sister of my engagement to Dr. Curran in my residence at Gardiner-street, in my mother’s presence. My sister did not say why Mr.

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M. R. Corbet was not to be told. I think she was afraid of him, but it had
1896. nothing to do with his approving or disapproving of the match."

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CORBET. Dr. Curran was next examined, and stated as follows:—"I am now retired from the service. I got my diploma in June, 1867, and my commission in the Army Medical Service in October, 1868. In 1869 I was ordered to India. In September, 1871, I came home on six months' leave to get married, and was married in January, 1872. I had known Mr. Corbet since 1864. I was staying with him at Bray; he brought me to Spring Farm, where Mrs. Dunlevie and my wife were living. I often visited them, and stayed on a visit, on my sister-in-law's invitation. I got engaged to be married at a picnic at the Glen of the Downs, in the summer of 1867; my wife came down from Dublin for the picnic. I did not tell Mrs. Corbet for some time afterwards. Mrs. Corbet and my wife went to my father's house, and my wife went to the Castle with my father's family.

"In November, 1871, I went to see Mr. Corbet, at his office, in Dublin Castle, and asked him would he give a little ready money to my intended wife. He refused to do so, but ultimately agreed to lend me some money, which he did. I signed an agreement, drawn up by his solicitor. He never said anything to me about my having married without my wife's consent. I am aware that several years ago my brother, now Judge Curran, had shown the will to a friend of his at the bar, and got a verbal opinion from him on it, but I did not know till a few days ago that there was any question about the construction of the will in reference to Mrs. Corbet's consent to the marriage."

The defendant was also examined, and stated as follows:—"The income from my wife's real estate is £1300 a-year, but it is heavily incumbered. We were married in August, 1865, and lived on Spring Farm. Mrs. Jennings and her daughter lived with us for some time, till a disagreement took place, and then they went to live in Gardiner-street. I offered to provide a sufficient income for them. I knew all about the terms of my wife's will. She told me that Dr. Curran was a suitor for the hand of her sister. There were also several others who were suitors for Miss Jennings's hand, and who used to visit at Spring Farm. She was an attractive young girl, and had young men

paying attention to her. The quarrel which my wife had with her mother rankled afterwards, so that they were never on the same terms as before. Mrs. Corbet's illness lasted four or five months. Neither Mrs. Jennings nor Miss Jennings ever came to see Mrs. Corbet during that time, nor did they come when she died. When Dr. Curran had the interview with me in Dublin Castle, he spoke very sharply. I was anxious to do the best I could, but I was not flush of money, and could not afford to give a present to my sister-in-law, as Dr. Curran suggested. I then proposed a loan.

"Mrs. Jennings and her daughters had lived at Spring Farm before I came there. I knew there was a provision in my wife's will that if Georgina Jennings married without my wife's consent, her children were to get nothing, but I never contemplated anything of the kind, for my whole desire was that this provision should be made for Miss Jennings, no matter whom she married. It was when Dr. Curran came to me at the Castle that I first knew he was about to be married to Miss Jennings. It never occurred then to me to tell Dr. Curran about the provision as to consent in Mrs. Corbet's will. It was not because I knew that Dr. Curran was visiting every day at Spring Farm, and met Mrs. Corbet, that I did not mention that to Dr. Curran."

The Attorney-General (The Right Honorable John Atkinson, Q.C.), Charles O'Connor, Q.C., and Daniel Mahony, for the plaintiff.

The defendant's main defence is, that Georgina Jennings (now Mrs. Curran), did not marry with the sanction and approval of the testatrix, and that such sanction and approval is a valid and subsisting condition precedent to the charge of £2000, and the raising thereof out of the lands devised to the defendant by the testatrix. But there are two answers to this defence: (1) that, although the marriage did not take place until after the death of the testatrix, yet the evidence shows that the testatrix approved of her sister's engagement to Dr. Curran, and this was sufficient to satisfy the condition; (2) that the condition as to marriage with sanction and approval only applied if the marriage took place in the lifetime of the testatrix, and, therefore, under the

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circumstances, no sanction or approval was necessary to make the gift valid.

As to (1), when a legacy is conditional on the marriage of the legatee with the consent of another person, the consent may be given by parol, unless it is required to be in writing, and it need not be given by express words, but may be implied by the conduct of the parties, *e.g.* by sanctioning the courtship, or approving of the engagement: *Harvey v. Aston* (1); *Berkley v. Rider* (2); *Strange v. Smith* (3); *Dashwood v. Lord Bulkeley* (4). The evidence of Mrs. Curran shows that her sister approved of the engagement, and that is sufficient sanction or approval of the marriage, although it took place after the sister's death.

As to (2), the condition is no doubt a condition precedent, but the consent required was that of the testatrix herself, and it was only intended that this should be required in the lifetime of the testatrix: *Green v. Green* (5), which was not as strong a case, as the consent required there was not that of a testator, but of the trustee of the settlement which imposed the condition. In *Dawson v. Oliver-Massey* (6), where a legacy was given to a child on marrying with the consent of parents, it was held that the consent of the surviving parent was sufficient. *In re Brown's Will* (7) was a different case, as there the legacy was conditional on the daughter attaining age or marrying with the consent of her guardians, and it was held that the fact there were no guardians made no difference, as guardians could have been appointed. *Booth v. Meyer* (8) is a case in point, as the consent there required was that of the testator, and it was held by the Master of the Rolls, following the law as laid down in *Dawson v. Oliver-Massey* (6), that marriage with A, after the testator's death, and without any written consent being left by him, was no breach of a condition to marry A without the consent of the testator.

The other defence is that the charge is not raisable during Mrs. Curran's lifetime. The will, however, says that the £2000 is to be raised off the estate for the child or children on their attaining

(1) 1 Atk. 361.

(2) 2 Ves. Sen. 532.

(3) 1 Amb. 262.

(4) 10 Ves. 242.

(5) 2 J. & L. 529.

(6) 2 Ch. D. 753.

(7) 18 Ch. D. 61.

(8) 38 L. T. (N. S.) 125.

the age or ages of twenty-one. The mother might have died during the minority of the children, and then they would have been entitled to interest on their contingent shares by way of maintenance. The intention was that the charge should not bear interest during the life of her mother and sister; the words are "the annuities," not "the annuity," and "upon the death of my said mother or said sister," not "*and*."

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The Solicitor-General (Kenny, Q.C.), Piers F. White, Q.C., and Harrington, for the defendant.

It is submitted that the action is not maintainable; for the £2000 is not a charge on the lands, and, even if it is a charge, it is not raisable at present.

(1) As to the first point made on behalf of the plaintiff, there must be a consent to the actual marriage—an approval of the engagement is not enough; it is said that a consent by the testatrix is to be implied from the evidence; but the only evidence on the point is that of Mrs. Curran, and she is not corroborated. Corroboration is necessary: *Finch v. Finch* (1); *In re Harnett* (2). Even if the testatrix approved of the engagement, it was in the summer of 1867 she did so, before she made her will, and there is no evidence of any consent afterwards.

(2) As to the second point, the condition is a condition precedent, and the fund, if raisable at all, is raisable out of real estate, and follows the rule as to conditions precedent attached to a devise of real estate; namely, that if the condition is impossible of performance either at the outset or in the events which happen, though there be no default by the devisee, the devise fails: Jarman on Wills, vol. ii., p. 849; there is no gift unless the condition is fulfilled, if the devise is to take effect only upon some particular event: Theobald on Wills, p. 451. The rule is different as regards bequests of personalty, where the civil law is followed, and the bequest becomes absolute, if the condition precedent is originally impossible, or becomes so by the act or default of the testator: Jarman, vol. ii., p. 852. If the legacy is charged both on real and personal estate, it will, so far as it is

(1) 23 Ch. D. 267.

(2) 17 L. R. Ir. 543.

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payable out of each species of property, be governed by the rules applicable to that species: *Jarman*, vol. ii., p. 853. If there is a mixed fund, the rule as to personalty applies: *Bellairs v. Bellairs* (1). There is no mixed fund here; the words are "my estates." All the cases cited, except *Green v. Green* (2), are cases as to personal estate. The reasoning of Sir E. Sugden in that case is unsatisfactory, and opposed to all the other cases.

The charge is not raisable during the life of Mrs. Curran. It is plain from the will that the property left to the defendant was not to be subject, at one and the same time, to the annuity of £100, and to the charge of £2000 at 5 per cent. The word "or," in the sentence "upon the death of my mother *or* sister," must mean "and," and the word "annuities," in the clause "that the said charge shall not bear interest while *the annuities* hereinbefore devised by, &c., shall be in force," must mean "annuities or annuity."

Daniel Mahony, in reply :—

Corroboration is not necessary, as there is no claim made by the plaintiff upon the estate of the testatrix, as was the case in the authorities cited. Consent to a marriage will be implied from the conduct of the person who is to give the consent. If the consent is once given, it cannot be recalled without some good reason: *Roper on Legacies*, pp. 810, 825, where the authorities upon conditions in restraint of marriage are collected; *Jarman on Wills*, vol. ii., p. 896.

Dec. 3.

THE MASTER OF THE ROLLS :—

This action is brought to obtain a decision upon the construction of the will of Mrs. Elizabeth Corbet, in reference to a charge of £2000. Mrs. Corbet was twice married; her first husband was a Mr. Dunlevie. It would appear that he had left a large amount of property at her disposal. His will was not before me, but both parties to this action are agreed that Mrs. Corbet could validly exercise the power conferred on her by Mr. Dunlevie's will. Some time after Mr. Dunlevie's death, in August, 1865, she married the

(1) L. R. 18 Eq. 513.

(2) 2 J. & L. 529.

defendant, William J. Corbet, a gentleman of position, and well known. On December 14th, 1867, she made her will, which is set out in the statement of claim. She died on April 21st, 1870. The question which I have to determine arises upon the construction of this will. It provides for three persons only—her mother, her sister, and her husband. There is a provision, in the event of her sister, who was not then married, marrying and having children, to which I shall presently refer.

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The will purports to be made in exercise of a power, and begins by giving a life annuity or rentcharge of £75, to her mother, Elizabeth Jennings, to be increased to £100 in the event, which did not happen, of her mother surviving her sister, Georgina Jennings. It then gives her sister, Georgina Jennings, a life annuity of £75, to be increased to £100, in the event which happened, of her sister surviving her mother. There is no distinction between rentcharge and annuity in the will; both annuities were charged on the lands. Her mother and sister had been living with the testatrix before her second marriage, and for some little time afterwards, as appears from the evidence, and this provision was a very important one for them. Then comes the clause on which the question turns: "And if the said Georgina Jennings should marry with my sanction and approval, I hereby charge all my estates with a sum of £2000, to and for the child or children of such marriage, in such shares and proportions as my said sister shall by deed or will appoint." I need not read any further at present. Subject to these provisions, she leaves all her property, real and personal, to her husband, and appoints him her sole executor. The plaintiff, Mary Dorothea Adye Curran, is the eldest child of the testatrix's sister, Georgina Jennings, who married Dr. Francis George Adye Curran, on January 10th, 1872. There are several other children of the marriage, but it would seem that the plaintiff is the only one who has attained age. She claims the £2000 under an appointment dated November 11th, 1895, made by her mother, which is regular on the face of it.

The defendant raises three points in his defence, but only relies on two of them, having properly abandoned at the bar the contention raised by paragraph 6 of the statement of defence. The first point is that the sanction and approval of the testatrix

M. R. was a condition precedent to the vesting of any interest in the
 1896. £2000 in the objects of the power. The second point is that even if
 CURRAN the charge vested, it is not raisable until after the death of
 v. Georgina Jennings, otherwise Curran. What, then, is the effect
 CORBET. of the clause in question?

A condition requiring consent to a marriage is clearly legal, and a condition precedent where it applies. It must be remembered that we are dealing with real estate as to which the rules of the civil law have no application. The owner of land may limit it on any contingency (within legal limits as to time) not in itself illegal, or transgressing the provisions of the common law. The strongest way this can be put for Mr. Corbet is to say that the testatrix left him lands subject to a charge which was not to come into existence except in one specified event, namely, marriage with sanction and approval; not marriage alone, but marriage with the sanction and approval of the testatrix; and that that event has not occurred, since marriage is only part of it. But is this sound? The clause in question is certainly not limited in operation to the case of a marriage in the lifetime of the testatrix. The Solicitor-General in terms admitted this, and then of course had to admit that it might apply to the case of a marriage twenty years after the death of Mrs. Corbet. But in such a case the consent would, or, at least might, be impossible of attainment, and the testatrix must have known that; that is, not alone consent to a particular marriage, but to any marriage whatever. It is not like the case of a condition requiring the consent of trustees, guardians, or the like; it is the testatrix's own consent. If the clause was meant to apply to a marriage after her death at all, it is hardly possible to suppose that she meant her consent to be limited to a consent given or to be given in her lifetime. How then does the clause run? "And if the said Georgina Jennings should marry with my sanction and approval."

If, then, I am right in thinking that it is quite impossible to hold that the intention was to benefit the children of the testatrix's sister by a marriage which might take place long after her own death, and when her consent could not be obtained, the consent in question must be limited to a consent in her lifetime. Read it so: "Should marry: with my sanction and approval if I am alive,"

and the whole thing is plain. The introduction of these words is necessary to complete the plain meaning, or rather these words *tacite insunt*. In this view, that which is admittedly a condition precedent in one event (marriage in the lifetime) is not a condition precedent to the event in question, namely, a marriage after the death of the testatrix; and this is a view founded upon the construction of the document itself, and not depending upon whether a condition precedent, in reference to the creation of an interest in land, does or does not become inoperative by reason of the impossibility of complying with it. As regards the cases, *Dawson v. Oliver-Massey* (1) was a case of personal estate. The consent there required was that of parents; one of the parents was dead, and it was held by the Court of Appeal that it must be implied that the marriage was to be with the consent of the parents, or parent, if any, and the consent of the surviving parent was sufficient, the legatee being in no default in the matter.

In *In re Brown's Will* (2) a legacy was given to a daughter on her attaining twenty-one, or marrying with the consent of her guardian or guardians. The legatee married under twenty-one, without the consent of any guardian or guardians, there being none. It was held by the Court of Appeal that the consent of guardians could not be dispensed with, because other guardians might have been appointed at the instance, or in the interest, of the legatee. This case is clearly not inconsistent with *Dawson v. Oliver-Massey* (1), and indeed recognises its authority; but it, too, is the case of personal estate. The case which most nearly resembles the present is *Booth v. Meyer* (3). The consent there required was that of the testator. The words were: "In case my said daughter Louise Frolich should at any time intermarry John Meyer the younger, of Conduit-street, Bond-street, in the county of Middlesex, tailor, without my consent in writing for that purpose first had and obtained, then the legacy given to her under this my will shall be absolutely void and of no effect." The daughter married John Meyer a year after the death of the testator, but he never gave his consent in writing to the marriage. There was a forfeiture clause in the event of the

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(1) 2 Ch. D. 753. (2) 18 Ch. D. 61. (3) 38 L. T. (N. S.) 125.

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daughter marrying without such consent, and the question for the decision of the Master of the Rolls (Sir George Jessel) was whether the forfeiture clause took effect. He there says:—"But when a man talks about consent he must mean consent in his lifetime. When I look to the time of the consent, I think the natural meaning of the will is:—'If she marries in my lifetime without my consent she shall not take the legacy.'" The Master of the Rolls, after referring to the judgment of the Court of Appeal in *Dawson v. Oliver-Massey* (1), held that the forfeiture clause did not take effect, as the consent of the testator was not under the circumstances a condition at all.

Green v. Green (2) is a case of real estate, and the only one cited. It turned on a clause in a settlement to which stricter rules of construction are applicable than to a will. The Lord Chancellor, at page 539, there says:—"The first question which arises is, whether the obtaining the consent of the trustee to his first marriage was a sufficient compliance with the condition. I am of opinion that it would not be sufficient in this case, if the trustee had been living at the period of the second marriage, particularly as regards the widow; for it was expressly declared that in case he should marry with the consent of the trustee, *but not otherwise*, his wife should have the jointure. It is an express declaration that none shall have the jointure but the woman whom he shall marry with the consent of the trustee." And at page 540 the Lord Chancellor continues:—"Upon the construction of the settlement I am of opinion, that all that was intended by the clause was, that Mr. Powell personally, during his lifetime, should have control over the marriage of the sons; and that consent having, by Mr. Powell's death, been rendered unattainable, this marriage, although without the consent of Mr. Powell, was such a marriage as to make the issue of it objects of the power. In coming to this conclusion, it is certainly very difficult to get over the words of the settlement respecting the power of jointuring; which limit the jointure 'to such woman or women as he should so marry,' that is, marry with consent: but as I think the intention of the parties was, that the obligation to obtain the consent should be imposed only during the lifetime of the party competent to

(1) 2 Ch. Div. 753.

(2) 2 J. & L. 529.

give such consent, I shall struggle with these technical terms, so as to effectuate the intention of the parties."

That case, as I read it, was decided on a question of construction, that if the intention of the settlor was that the condition should not be a condition precedent in a certain event it would not be regarded as a condition precedent. No doubt the facts of that case were not the same in all respects as those before me; but it appears, so far as I can see, to be very much in point, and, being a decision of Lord St. Leonards, it would certainly bind me in this Court, notwithstanding the view of Mr. Jarman, and perhaps notwithstanding the *dictum* of Jessel, M. R., in *Bellairs v. Bellairs* (1). Although *Booth v. Meyer* (2) was a case of personal estate, it is just as applicable as if it was a case of real estate, so far as the construction of the will is concerned.

But it is really unnecessary for me to decide this point, because I feel bound to hold on the evidence given *viva voce* in Court, that the marriage was with the "sanction and approval" of the testatrix. On this point I have only the evidence of Mrs. Curran. From the nature of the case it would be almost impossible to get any other evidence. I am satisfied that the sanction and approval was given. If Mrs. Curran's evidence was not corroborated it was not contradicted; and indeed the Solicitor-General did not ask me to disbelieve her. The circumstances were these: Dr. Curran was at the time a medical student. He was going down to the county Wicklow, visiting at the house of Mrs. Corbet, and paying court to her sister. Mr. Corbet admitted that this was the case, and gave his evidence with perfect fairness. Dr. Curran was paying his addresses to the girl. Of course her sister would be aware of it. She would be prepared for a proposal, and a proposal came. Mrs. Curran says that she told her sister of Dr. Curran's proposal, and that she was greatly pleased. This was repeated on another occasion, and I have no doubt that she gave her sanction. I believe Mrs. Curran's evidence. The Solicitor-General said that the consent given was only a sanction to a marriage, to take place within a reasonable time, or a sanction which might be withdrawn. There is, however, nothing to show

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(1) L. R. 18 Eq. 510.

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that the sanction was withdrawn, or that the marriage did not take place within a reasonable time. Mr. White, on the other hand, asked me to disbelieve the evidence, or at any rate to disregard it as uncorroborated, and referred to the rule which requires corroboration in the case of a claim against the assets of a deceased person. But it must be remembered that the claim here is by Miss Curran, not by Mrs. Curran, and the rule as to corroboration does not apply. The will itself provided for the charge; the question is, is it raisable? I am clearly of opinion that the marriage took place with the sanction and approval of the testatrix, and therefore that this charge would in some event be raisable.

There remains, however, the question, whether the charge is payable in the lifetime of Mrs. Curran. Upon the whole, having regard to the words of the will, I am perfectly clear that it is not. It would be raisable, and could be raised, if the parties wished it, for their protection, but no one wants it raised if the income is not payable to the plaintiff at present. The defendant says, that it is not raisable until Mrs. Curran's annuity has dropped. This turns entirely on the language of the will. There are no authorities bearing on the subject. The words are: "I hereby charge all my estates with a sum of £2000, to and for the child or children of such marriage, in such shares and proportions as my said sister shall by deed or will appoint, said sum of £2000 to be raised off my estates for said child or children on their attaining the age, or ages, of twenty-one years, respectively." If it stopped there, there would be no question that the charge would be vested and payable on the child or children attaining twenty-one years of age; but it goes on:—"and my further will is, that the said charge shall not bear any interest during the lives of my said mother or my said sister, or the survivors of them." That is to say, it was the intention of the testatrix that the charge should not bear interest during the lives of her mother and sister, when £150 a-year would be payable out of the estate, nor during the life of the survivor, when £100 would be payable; that is quite clear, but the will proceeds: "and that immediately upon the death of my said mother or said sister said charge shall carry interest at the rate of 5 per cent. per annum." Mr. O'Connor, on behalf of the plaintiff, argued

that these words meant whichever of them should die first. I think, however, that there is merely an inaccuracy of expression in the will; it would, of course, have been better if the word "and" had been used instead of "or," but it is impossible to read this clause in any other way than as if the word had been "and." The next words demonstrate this:—"it being my true will and intent that the said charge shall not bear interest while the annuities hereinbefore devised by me shall be in force"; the words, "the annuities," must mean "the annuities, or either of them." There is no doubt some inaccuracy of expression, but the whole meaning is clear. The lands were not to be liable to more than one sum of £100 per annum. Some events are not clearly defined; for instance, the last clause empowers her sister, in the event of her dying without leaving children her surviving, who should attain twenty-one years of age, to appoint the interest on the charge to her husband for his life. That event has not happened, and although the testatrix does not provide for the event of her mother surviving her sister, I think there is no doubt that she assumed that her mother would pre-decease the sister. On the whole, I have no doubt that the charge will not bear interest until Mrs. Curran's annuity shall cease. With regard to the execution of the power of appointment, the correspondence indicates that Mrs. Curran entertained, at one time, the intention of appointing to more than one child, but it appears that the appointment of the whole fund has been made to the plaintiff only, she alone having attained age, and probably made with reference to the institution of this suit. I do not wish to express any opinion on the validity or invalidity of the appointment, nor have I the materials for doing so. But it is right to point out that an appointment to one child in order to benefit the whole family might raise a serious question when the other children attain age, as to whether it was or was not a fraud upon the power. As to the costs, as Mr. Corbet has resisted the claim as a whole, he must pay the costs of the action; it is, however, really an administration suit, and I shall order the costs to be paid out of the assets, if it is so desired, the result being the same.

Solicitors for the plaintiff: *V. & W. B. Dunn.*

Solicitors for the defendant: *V. B. Dillon & Co.*

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(1893. No. 86.)

Mortgage by husband of life estate in lands—Postponement of pin-money by wife—Sale of life estate in portion of lands discharged from pin-money—No apportionment between sold and unsold lands—Mortgage of pin-money and jointure and policy of life insurance—Premiums debited in loan account—Change in course of dealing—Lapse of policy—Estoppel.

By a settlement on the marriage of D. and M. lands were vested in trustees, on trust, out of the rents and profits, to raise the annual sum of £300 for M. during the joint lives of D. and M., subject thereto for D. for life, after his death to pay to M., in case she survived him, £500 annually for her life. D. incumbered his life estate, and M. joined in some of the mortgages and postponed her annuity of £300. The life estate of D. in portion of the lands was sold in the Landed Estates Court, discharged from the annuity of £300, and produced more than sufficient to pay the amount then due. By mortgage in 1876 D. and M. mortgaged to an Insurance Company D.'s life estate in the residue of the lands, and also the annuities of £300 and £500, and further, a policy of insurance effected with said Company on the life of M., to secure repayment of £1200 and further advances.

A receiver had been appointed over the lands, and under a consent order all rents were paid directly to the Insurance Company, who in a loan account credited such payments and debited the account with the premiums on the policy and interest on same to the month of October, 1890. D. died on the 7th of October, 1889, and the receiver was discharged. There was no evidence that the Company gave any notice of their intention to change the course of dealing as to the premiums on the policy. M. died on the 29th October, 1891. In an action by the Company to have the arrears of the annuity of £300 declared well charged upon the fee and inheritance of the unsold lands and the arrears of the £500 annuity declared well charged upon the fee and inheritance of all the lands comprised in the said settlement:—

Held, that the payment of the £300 a-year was not confined to the rents and profits during the life of the tenant for life. *Pepper's Trusts* (13 L. R. Ir. 108) followed.

Held, that although the £300 a-year was in the nature of pin-money, the assignees for value of the wife were entitled to resort to the entire amount of

arrears, and that the principle of *Howard v. Digby* (2 Cl. & F. 634) did not apply where the wife had parted with her right to the personal enjoyment of the pin-money, or the husband had been deprived of the enjoyment of the estate on which it was charged.

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Foss v. Foss (15 Ir. Ch. Rep. 215) followed.

Held, that neither the postponement by M. of her annuity of £300 a-year to the mortgages, nor the proceedings in the Landed Estates Court, operated as a release of the annuity or an apportionment of it on the unsold lands.

Held, that inasmuch as no communication had been made to M. of the Company's intention to treat the policy as lapsed, it would be unfair and inequitable to allow the Company so to treat it.

ACTION to have arrears of an annuity of £300 declared well charged upon the fee and inheritance of certain lands, situate in the county of Kerry, and also to have arrears of an annuity of £500 declared well charged upon the fee and inheritance of the lands comprised in an indenture of settlement of the 9th of February, 1858.

That the sum due to the plaintiff for principal and interest on foot of a mortgage, dated 31st October, 1876, might be declared well charged on the said annuities and all arrears thereof.

That if necessary an account might be taken of what was due to plaintiff for principal and interest on foot of the said indenture of mortgage.

That if necessary an account might be taken of the arrears of the said annuities, and that the plaintiff, as assignee by way of mortgage, might be declared entitled to the amount found due on foot of the arrears of the said annuities or so much thereof as should be sufficient to discharge the amount found due to him on foot of said mortgage.

That the amount to which the plaintiff should be found entitled might be raised by a sale of the lands comprised in the said indenture of settlement, or a competent part thereof, and in the meantime that a receiver might be appointed.

The statement of claim set forth that the late Daniel O'Donoghue was seized in fee-simple in possession of the lands comprised in

V.-C. an indenture of settlement dated 9th February, 1858, executed
 1896. on his marriage with Mary O'Donoghue, whereby the said Daniel
TUFFNELL O'Donoghue granted and released unto the trustees the lands
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O'DONOGHUE therein mentioned upon trust, after the solemnization of the marriage, out of the rents and profits thereof, to levy and raise the annual sum of £300, and to pay the same unto the said Mary O'Donoghue for her separate use, and not to be subject to the debts or control of her husband, and subject thereto upon trust for the said Daniel O'Donoghue for life, and after his death, and in case the said Mary O'Donoghue should survive him (which event happened) to pay unto the said Mary O'Donoghue and her assigns, the annual sum of £500, during her natural life by way of jointure, and after the death of the said Daniel O'Donoghue, to the use of the first and other sons of the said marriage in tail male with divers remainders over.

Subsequently to the said marriage, and prior to the execution of the mortgage hereinafter mentioned, part of the lands comprised in the said settlement were sold and conveyed for the life of the said Daniel O'Donoghue, freed and discharged from the said annuity of £300, charged thereon by the said settlement.

By indenture of mortgage dated the 31st October, 1876, and made between the said Daniel O'Donoghue, of the first part, the said Mary O'Donoghue of the second part, William Michael Tuffnell (the plaintiff) and Edward Butler, of the third part, the said Daniel O'Donoghue and Mary O'Donoghue granted and assigned to the said William Michael Tuffnell and Edward Butler, their executors, administrators and assigns, the said annuity of £300, and all arrears thereof, and also the said annuity of £500, so charged as aforesaid under the said indenture of settlement upon the lands therein comprised, and all the estate, interest and title of the said Mary O'Donoghue, in and to the said annuities and arrears thereof, and the said lands and premises charged therewith; also a certain policy of insurance effected by the said Mary O'Donoghue on her life with the Reliance Mutual Life Assurance Society; as to all the said premises by way of mortgage, to secure repayment of the principal sum of £1200, and also such further sum or sums as should thereafter be advanced by the said William M. Tuffnell and Edward Butler, or the survivor of them,

to or on account of the said Daniel O'Donoghue and Mary O'Donoghue, or either of them, with interest thereon as therein mentioned.

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The said indenture contained a declaration that the said sum of £1000, so lent as aforesaid was, and that all further advances which should be thereafter made as aforesaid should be deemed to be, money belonging to the lenders as trustees of the Reliance Life Assurance Society. The said Mary O'Donoghue duly acknowledged the said deed.

Upon the execution of the said indenture of mortgage notice thereof was given to the trustees of the said indenture of settlement, and the said William M. Tuffnell and Edward Butler entered into the receipt of the said annuity of £300, and certain sums were paid to them on foot thereof by the receiver appointed over the said lands.

The said Daniel O'Donoghue died on the 7th October, 1889, leaving the said Mary O'Donoghue (his widow) and the defendant Geoffrey Charles Patrick O'Donoghue, his eldest son, with other issue, him surviving, and the said Geoffrey C. P. O'Donoghue entered into possession of the lands and premises comprised in the said indenture of settlement as tenant in tail thereof.

The said Mary O'Donoghue died on the 29th October, 1891, intestate, and administration of her personal estate was granted to the defendant Geoffrey Charles Patrick O'Donoghue.

The said Edward Butler died on or about the 6th November, 1890, leaving the plaintiff him surviving, and thereupon all the estate and interest of the said William M. Tuffnell and Edward Butler in the said annuities, and also the principal sums due on foot of said mortgage, became vested in the plaintiff as trustee for said Assurance Society.

The plaintiff alleged that there was due to him as assignee of the said annuities, seventeen half-yearly gales of the said annuity of £300, amounting to the sum of £2550, and also four half-yearly gales of the said annuity of £500, amounting to the sum of £1000, and also that there was due to the plaintiff on foot of the said mortgage the sum of £1645 11s. 1d. for principal, and the sum of £770 10s. 3d. for interest up to the 7th November, 1893, making together the sum of £2416 1s. 4d.

V.-C. *Serjeant Campion, Q.C., Price, Q.C., Stanley, Q.C., and Wade,*
 1896. for the plaintiff:—

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This charge was a rentcharge for life of £300 for the wife's separate use, and there is no clause against anticipation. There is no difference between pin-money and other separate estate: Davidson's Prec., vol. iii., part 1, page 73 (3rd edition), note. Even if this were pin-money, the rule that arrears of separate estate or pin-money cannot be recovered has no application against a purchaser for value of the pin-money: *Foss v. Foss* (1).

It has been argued that this is not a charge on the inheritance, but the deed vested this annuity in trustees upon trust to pay it out of the rents and profits not "during life," but absolutely. Cases are only taken out of the ordinary rule, where there is something to limit the gift. Moreover, here the beneficial interest is settled "subject thereto": *Pepper's Trusts* (2); *Bell v. Bell* (3). In the suit of *Nugent v. Sugrue*, nineteen gales of this annuity were, by the decree of the 19th December, 1867, declared to be payable. The Court is now in effect asked to overrule this decree.

The policy on Madam O'Donoghue's life has lapsed. There is no evidence that it is subsisting. There is no authority for saying that because four or five premiums were charged in the loan account this amounted to a course of dealing by which the plaintiff was bound. The defendant must go the length of saying that the Company were bound to go on indefinitely, heaping up the unpaid premiums against the security (4).

Matheson, Q.C., Meredith, Q.C., and D. McCarthy Mahony, for the defendant Geoffrey O'Donoghue:—

This annuity is pin-money, and no more than one year's arrear can be recovered. There is a distinction between separate estate and pin-money which cannot be assigned so as to give the assignee any right which the lady would not have. In *Foss v. Foss* (1) the wife was alive, and that case is not law in the

(1) 15 Ir. Ch. R. 215. (2) 13 L. R. Ir. 108. (3) Ir. R. 6 Eq. 239.

(4) The substance of the oral evidence given at the trial upon this branch of the case will be found stated in the judgment of the Vice-Chancellor, *infra*, pp. 375-378.

form in which the judgment is given: Lush on Husband and Wife, pp. 48, 49; *Ex parte Elder* (1); *Howard v. Digby* (2). V.-C.
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In no case has it been held that the personal representative can recover more than a year's arrear. This annuity was charged on the life estate of Daniel O'Donoghue, and not on the fee. TUFFNELL
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The life estate in portion of the lands included in the mortgage having been sold discharged from this annuity, an apportionment of the annuity between sold and unsold lands resulted.

On the frame of the settlement it is not clear that arrears could be raised out of the *corpus*.

[Counsel referred to *Pepper's Trusts* (3); *Foster v. Smith* (4); *Playfair v. Cooper* (5); *Bell v. Bell* (6); *Baker v. Baker* (7); *Wrixon v. Vize* (8); *Loftus v. Swift* (9); *Aston v. Aston* (10); *Booth v. Smith* (11); *Hughes v. Coles* (12).]

The Insurance Company were not entitled suddenly to alter their course of dealing with reference to charging the premiums in a loan account without some notice to Madam O'Donoghue.

Drummond, Q.C., and *P. H. Law Smith*, for the trustees of the settlement of the 9th February, 1858.

R. Brereton Barry for minor defendants.

THE VICE-CHANCELLOR:—

Dec. 4.

The relief sought in this case is on foot of a mortgage by Daniel O'Donoghue and Mary his wife, usually known as The O'Donoghue and Madam O'Donoghue, to the plaintiff and another, as trustees of the Reliance Mutual Insurance Society, of two annuities of £300 and £500 respectively, charged on The O'Donoghue estates by their marriage settlement. The annuity of £300 was for the joint lives of The O'Donoghue and Madam O'Donoghue, and was in the nature of pin-money. The other was a jointure pro-

(1) 2 Madd. 282.

(2) 2 Cl. & F. 634.

(3) 13 L. R. Ir. 108.

(4) 1 Phil. 629.

(5) 17 Beav. 187.

(6) Ir. R. 6 Eq. 239.

(7) 6 H. L. Cas. 616.

(8) 3 Dr. & W. 104.

(9) 2 Sch. & L. 642.

(10) 1 Ves. Sen. 264.

(11) 14 Q. B. D. 318.

(12) 27 Ch. D. 231.

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vided for Madam O'Donoghue for her life from the death of her husband. As the mortgage was a security upon these charges upon the settled lands, it is manifest that the case must be regarded in a twofold aspect, first as regards the claims of Madam O'Donoghue, and her mortgagees against the settled lands, which the defendant Geoffrey O'Donoghue succeeded to on his father's death as tenant in tail, and is now in possession of; and second, as regards the relative rights of the Insurance Company as mortgagees and their mortgagors. The inheritance cannot be made chargeable on foot of the plaintiff's claim beyond whatever balance may be found due by the settled lands on foot of the annuities. The plaintiff cannot recover against that balance more than what may be found due to the Insurance Company on foot of the mortgage, as between them and their mortgagors. So far as anything may appear to be due on foot of this latter account the Company will be entitled to claim on foot of the former account against the settled lands as assignee by way of mortgage of the pin-money and jointure, but they cannot claim more. As the Company obtained as part of their security the order on the receiver in *Nugent v. Sugrue* to pay the rents of the estate to them, all moneys received from the receiver must be debited to them as paid on foot of the pin-money which accrued during the life of The O'Donoghue, and on foot of the jointure after his death. There must, therefore, be an account on foot of the pin-money and jointure respectively, and of all sums received from the receiver or otherwise on foot thereof, and a balance ascertained. The other branch of the account will be between the representatives of Madam O'Donoghue as mortgagor on the one hand, and the plaintiff on the other.

Several questions of difficulty and importance have been argued in this case which it is necessary to dispose of at this hearing. The first is the contention of the defendants that the annuity of £300 for Madam O'Donoghue was not charged on the fee and inheritance of the lands comprised in the settlement, but only on the life interest of The O'Donoghue, and that consequently the same ceased on his death. The estates were conveyed in fee to the trustees of the settlement upon trust out of the rents and profits thereof to levy and raise the annual sum of

£300, and to pay the same to Madam O'Donoghue for her separate use, and subject thereto then upon trust for her husband for his life, with usual remainders over. The lands are granted in fee to the trustees upon other trusts, the first of which is to raise out of the rents and profits the said sum of £300 a year, and to pay the same to Madam O'Donoghue for her separate use, and *subject thereto* upon trust for The O'Donoghue for life, and after his death upon trust to pay to his wife a jointure of £500 a-year for her life. I am of opinion that the principle upon which I acted in *Pepper's Trusts* (1) applies to this case, and that the payment of the £300 a-year is not confined to the rents and profits during the life of the tenant for life.

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The next question is whether any, and if any, what arrears of this annuity of £300 can be recovered out of the lands so charged. The defendants contend that no arrears can be recovered after the death of the wife, and that at most not more than one year can be so recovered. They contend that the £300 a-year was in the nature of pin-money, and that the rule as to pin-money is that the account cannot go farther back than one year prior to the husband's death, and that after the wife's death no arrear can be recovered by her personal representative. I am of opinion that the £300 was in the nature of pin-money, but whether it be this, or ordinary separate estate, the rule is the same. The defendants base their contention mainly on the language of Lord Brougham in the case of *Howard v. Digby* (2), where the suit was by the personal representative of the wife against the personal representative of the husband, to recover arrears of pin-money for a number of years before the death of the husband. The Duke had received all the rents of the estates charged during all the period, and maintained the Duchess according to her rank up to his death. The House of Lords held that no arrears were recoverable. That case, however, differs materially from the present, in which, firstly, the wife assigned her pin-money for valuable consideration, and secondly, the estate chargeable was not enjoyed by the husband, but was under a receiver appointed by the Court. The principle on which the rule was established is that while the estate is enjoyed by the

(1) 13 L. R. Ir. 108.

(2) 2 Cl. & F. 634.

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husband, and the wife maintained by him, and when the pin-money remains payable to the wife for her own use, it will be presumed that the wife has consented to forego her claim against her husband or his estate. That principle cannot apply to cases where either the wife has parted with her right to the personal enjoyment of the pin-money, or the husband has been deprived of the enjoyment of the estate on which the pin-money is charged.

Both these propositions were affirmed by Smith, M.R., in the case of *Foss v. Foss* (1) where he held that the rule had no application whatever where a receiver has received the income of the property out of which the pin-money or separate estate would have been payable, and where no part has been received by the husband or applied for the use of the wife or of his family, and also that it was impossible to understand what application the alleged rule could have as against a purchaser for value of the separate estate.

I therefore hold that in the present case the Company as assignees for value of this annuity of £300 are not limited to the period of one year before The O'Donoghue's death, but are entitled to resort to the entire amount of the arrears due on foot of it, so far as may be necessary for payment to them of the amount, if any, which shall be found due to them on foot of their mortgage.

Another important question has been raised by the defendants as to the effect of certain proceedings in the Landed Estates Court for sale of the life estate of The O'Donoghue in the lands included in the marriage settlement. These lands were all subject to payment of the £300 a-year to the wife. By deed of the 15th March, 1861, the husband mortgaged his life estate in all the lands to the Scottish National Insurance Company for £4000, and the wife joined in the deed and postponed her £300 a-year to this mortgage. Proceedings were taken in the Landed Estates Court for sale of the life estate of the husband for payment of incumbrances upon it, and the life estate in portion of the lands included in this mortgage was sold for the purpose and produced more than enough to pay the amount due. The life estate in the lands so sold was sold discharged of the postponed annuity. The de-

(1) 15 Ir. Ch. R. 215.

pendants contend that the effect of all this was to work an apportionment of the annuity of £300 between the lands so sold and those remaining unsold. The old common law doctrine that the release of portion of the lands which are subject to a rentcharge issuing out of the whole operated as a discharge of the whole land, was relied on as modified by the 10th section of 22 & 23 Vict. c. 35. The construction put on that section by the Court of Appeal in *Booth v. Smith* (1) was that the saving clause "without prejudice to the rights of all parties interested in the hereditaments remaining unreleased and not concurring in or confirming the release" operated as an apportionment of the rentcharge between the hereditaments released and those remaining unreleased; and that the latter could be charged with a proportionate part of the whole rentcharge according to the relative values. The basis of that decision seems to be that the right to contribution between the portion released and the residue of the hereditaments charged was that the whole being prior to the release charged with the rent, the rentcharger could have resorted to any part for payment of the whole, and the owner of the part so resorted to could call upon the owner of the other part of the hereditaments for contribution, but only for the excess which he was so made to pay upon his own apportioned share of the liability. I am unable to see how that principle applies to a case like the present. In the first place, the transaction here was not a release of any part of the annuity, nor was it intended to be. The annuitant merely agreed to permit the mortgage to be paid in priority to any claim by her, but the very postponement implied that the entire annuity was still to be payable out of all the lands charged, though in a later priority. It was not the case here, as in *Booth v. Smith* (1), that the hereditaments charged with the rentcharge were all conveyed by the owner in separate portions out-and-out; for here it was a disposition for a limited purpose, that is, by way of mortgage, to one grantee of the whole lands, the equity of redemption in the whole remaining still in the mortgagor who was in equity still the owner by virtue of his equity of redemption. There was no division of the acreable contents into portions, the value of each of which

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1896. inconsistent with the nature of the transaction, for there was no
TUFFNELL contract to the effect that the annuitant was to part out-and-out
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remedies for the recovery of it. The mortgage itself therefore did
not, in my opinion, operate as a release. Then the effect of the
proceedings in the Landed Estates Court was relied on, but these
could not in themselves change the rights of the parties whatever
they were, and could only give effect to them. This was the course
taken by the Court, for it sold enough to pay the prior incum-
brances to which the annuity had by the contract been postponed,
and left the other lands unsold subject to the same liabilities as
before. The rents of these lands were received by the receiver of
this Court, and applied under its order towards payment of the full
£300 a-year so far as they extended.

There was another charge by way of annuity created by
O'Donoghue and wife, which was paid off in the Landed Estates
Court, and Sugrue's mortgage, which was also in like manner
created, was paid off, partly out of rents, and the rest out of the
proceeds of a life policy. The same reasons apply to these trans-
actions as those I have stated as to the Scottish National Insurance
Company's mortgage.

I am of opinion that none of these transactions operated as a
release or apportionment of the annuity of £300 a-year, and shall
direct that in taking the accounts this annuity shall be taken at its
full amount throughout.

It was further contended by the defendants that these trans-
actions cast an undue burden on the estate in remainder, by
creating charges on the life estate of The O'Donoghue, and giving
them priority over the pin-money, which was a charge on the
inheritance. That such was the result of these transactions there
is no doubt; but they were not fraudulent transactions made with
that intent. They were *bona fide* loans which would have been
repaid out of the securities upon which they were advanced but
for the change in the value of property, which reduced the rental
relied on when they were entered into. In the present case a policy
of insurance was effected on the life of Madam O'Donoghue,
which would have had the effect of protecting the estate of the

remainderman. I cannot hold that the nature of the transactions was such as to disentitle the plaintiff from enforcing against the estate in remainder the sum, if any, that may be ascertained to be payable out of it.

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The result of my opinion on these questions is, that an account must be taken as between the pin-money and the inheritance, in which the entire amount of the annuity of £300 must be charged as a debit, and the entire payments out of the rents received from the receiver, in *Nugent v. Sugrue*, must be credited and the balance ascertained.

I now come to the other account which must be taken, namely, an account of the mortgage as between the mortgagors and mortgagees. As to this, the first question is as to the amount of principal secured by the mortgage; that is to say, whether the Company should be allowed to claim on foot of the mortgage several sums paid by them to or for O'Donoghue and Madam O'Donoghue, or one of them, from time to time, as shown by them in the account furnished to the defendants. The Company claims to add these to the £1200 primarily secured, as further advances on foot of the mortgage, and to charge interest on them as such. This question turns upon the construction of the mortgage deed. That deed recites a mortgage of the 13th April, 1861, by O'Donoghue and wife to J. H. Sugrue of the wife's £300 a-year for £1000, and that O'Donoghue and wife had applied to the Company to make a present loan of £1200, and also to advance to them afterwards a further sum or sums of money, not exceeding £1000, for the purpose of paying off the mortgage to Sugrue therein mentioned, which they had agreed to do on having the *same*, that is the £1200, and the further advance of £1000, secured as thereafter mentioned. It then contains a covenant by O'Donoghue and wife to repay the said sum of £1200 by a given day, and also within six months from the time or times of the same being advanced to repay to the Company such other moneys as might be advanced by the Company to them, provided that such further sum or sums to be advanced should not exceed £1000, and to pay interest on the £1200 and on such further sum or sums which should be advanced *as thereafter provided*. O'Donoghue and wife then conveyed to the Company the £300

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a-year and the jointure of £500 a-year, subject to redemption ; and also the policy of insurance for £2700 effected on the life of Madam O'Donoghue with the Company, also subject to redemption. The proviso for redemption was on payment of the £1200 and interest, and such other moneys as might be advanced by the Company to or on account of them or either of them, with interest. There is also a further covenant by O'Donoghue and wife for payment of interest, so long as the principal sum of £1200, or such further sums as should be advanced, *as thereafter provided*, should remain unpaid, on the said sum of £1200, and such further sums as should be thereafter advanced *as aforesaid*. The deed then contains a covenant by O'Donoghue and wife with the Company that they would within six months from its date procure Sugrue's mortgage to be reconveyed to the O'Donoghues, or assigned to the Company, or as the Company should direct, and a covenant by the Company to advance to O'Donoghue and wife a further sum or sums not exceeding the sum of £1000 for the purpose of, and to be applied by the O'Donoghues in, paying off and discharging the recited mortgage to Sugrue.

From the inaccuracy of language of this deed, in the places where it provides for further advances, doubts have arisen whether it intended to confine such advances to the sum of £1000 for the purpose of paying off Sugrue's mortgage, or to extend them to all sums which might thereafter be lent to, or paid for the O'Donoghues by the Company. The language of the covenant for repayment; and the proviso for redemption is general, and is wide enough to provide for all further advances, but it is capable also of bearing the limited construction contended for by the defendants. The state of the property shows the importance to the Company of making the loan of £1200 to have Sugrue's mortgage, which appears to be the only charge prior to the proposed loan cleared off, or transferred to the lenders, who would then have a first charge for their loan. Accordingly, we find that it was a part of the contract that it should be so dealt with, and that the Company should advance the money necessary for the purpose. The agreement for the loan stated in the deed includes this further advance, estimated at £1000, and that the Company had consented to advance the £1200, and this further sum of £1000,

and to have "the same" secured to them as after mentioned. Nothing appears in this arrangement of an intention to make, or to get security for general advances. The limit of further advances is expressed to be £1000, which would leave no margin for such advances. The covenant for repayment limits the time for the making of further advances to six months, and the amount to £1000, in both respects exactly tallying with the stipulated dealing with Sugrue, and further on it speaks of the sum, or sums which should be advanced as thereafter provided. The only advance that answers this description is that which is expressly provided in the later part of the deed for paying off Sugrue. The same expression as to further advances is repeated in a later covenant. In the proviso for redemption there is no limit of either time or amount, but this may be fairly controlled by the general purpose of the parties, and the language of other portions of the deed. The payment off of Sugrue's mortgage is not left optional, but is the subject of the correlative covenants in express terms, making it obligatory on the borrowers on the one hand, to procure such discharge, and on the lenders on the other hand, to provide the borrowers with funds for the purpose. The amount of the policy, £2700, being £500 in excess of the limit of the security, is not of much weight, as it would be a prudent and reasonable requirement of the Company to leave a margin to cover arrears of interest on the £1200 and £1000, and incidental charges.

I am of opinion, that on the true construction of the deed, the Company are not entitled to claim on foot of the mortgage for any general loans or advances to the O'Donoghues.

The mortgage to Sugrue was afterwards paid off in another way, and therefore an arrangement was made between the Company and the O'Donoghues to reduce the sum secured by the policy by £1000, and to reduce the premiums in proportion.

I now come to the most important and difficult question in this case, namely, as to how the policy of insurance effected by Madam O'Donoghue on her life, with the same Company, is to be dealt with. The defendants contend that they are entitled, by reason of the conduct of the Company, to have the policy regarded as subsisting and in full force at the death of Madam O'Donoghue, and to have the full amount secured by the policy, as reduced as

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before mentioned, with any bonuses thereon, applied in or towards the satisfaction of whatever may be found due on foot of the mortgage.

The property being in strict settlement, and the life estate of The O'Donoghue being incumbered, the only security which could be given for a loan were the pin-money and jointure of Madam O'Donoghue, and as these depended for continuance on her life, it is clear that an insurance on her life would offer the only adequate security that a lender could obtain. The Reliance Company would also have the advantage of the policy being effected with themselves. The Company agreed to advance £1200 on the security of a mortgage of the pin-money and jointure, and a policy to be effected with them for £2700, the payment of the premiums being secured by the covenant of the borrowers, but more effectually by being charged on the annuities to be mortgaged to them. They also required that they should be empowered in case of default to pay the premiums themselves, or rather to write them off as paid, and to have a charge for all sums so paid, with interest at 6 per cent. per annum, but that it should not be obligatory on them to make such payments. The settled estates being at that time under a receiver of this Court, in the cause of *Nugent v. Sugrue*, the Company stipulated that they should be at liberty, if they should think fit, to apply for an order in that suit that all moneys payable by the receiver to Madam O'Donoghue on foot of her £300 a-year should be paid to them on their own receipt. It is evident that under these circumstances the policy was to form the main security for repayment of the principal, and that it was to be kept on foot out of the £300 a-year of Madam O'Donoghue, and that the premiums and interest were to be paid by means of the moneys from time to time to be obtained from the receiver. The mortgage was accordingly prepared on this basis. It contains recitals of the marriage settlement, the appointment of the receiver, the sale of a portion of the settled lands discharged of the annuities for payment of prior incumbrances, and the effecting of the policy at a premium of £50 18s. 3d. half yearly; and contains covenants by The O'Donoghue and Madam O'Donoghue for payment of the £1200 and interest, and the further advances therein mentioned, and an assignment by them to the Company of the annuity of

£300 a-year, and the jointure of £500 a-year subject to redemption, and also an assignment to the Company of the policy, and all bonuses and other moneys to become payable thereon, subject to the same proviso for redemption. Then follows a covenant by the lenders that if they should receive any money under the policy they should pay thereout all costs they should have incurred, and in the next place apply the same towards the satisfaction of the moneys which should be due on the mortgage, and pay over any balance to Madam O'Donoghue. It then provides that if the policy should become voidable Madam O'Donoghue would effect a new policy in its place in the names of the lenders, and Madam O'Donoghue covenants for payment of the premiums, and in default that it should be lawful for the lenders, but not obligatory on them, to pay the same, and that she would repay them all sums so advanced by them, and all moneys expended by them in effecting any new policy with interest, and that in the meantime, and until such moneys should be paid with interest, the moneys to become payable under the policy assigned, or any new policy, and also the annuities of £300 and £500 should be charged with such sum and interest. The deed further provides that it should be lawful for the Company, at their own absolute discretion, at any time to apply to the Court to direct the receiver in *Nugent v. Sugrue* to pay to the Company the accruing gales of the annuity of £300 as they should become payable; and O'Donoghue and wife appointed the lenders their attorneys in their names to receive and give effectual discharges for the said annuities and the arrears thereof, and to appoint counsel to appear for them on any such application, and give their consent thereto.

The Company immediately afterwards obtained a consent from the O'Donoghues, dated the 31st October, 1876, and applied to the Court in *Nugent v. Sugrue*, on the 1st December in the same year, that the receiver should during the joint lives of Daniel and Mary O'Donoghue, or till further order, pay to the plaintiff Tuffnell and his co-trustee Edward Butler the balance which should from time to time be found due on foot of the annuity of £300 a-year and arrears thereof. In pursuance of this order the receiver paid all balances applicable to payment of the £300 a-year to the Company. The Company opened an

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account in their books of this transaction which is headed "Madam O'Donoghue in account with the Reliance Life Office," and is called a "Loan Account," in which the premiums and interest were debited half-yearly as they fell due, and all sums received from the receiver were credited from time to time against them. No cash payments were ever made directly by the O'Donoghues on foot of either interest or premiums, nor were any such payments applied for by the Company, save so far as sending to them the usual formal notices that the premiums would be due on such a day. In fact, as admitted by the late secretary, Mr. Griffith, in his evidence, the transaction was never dealt with as is usual in the ordinary cases of policies, but as of a different class, namely, policies connected with a loan account. The Company by the order they obtained in *Nugent v. Sugrue* in effect constituted themselves mortgagees in possession, and took on themselves the duty of getting in the income of the mortgaged property and applying it to the payment of their demand in the prescribed manner. A most important part of such application was the payment of the premiums which, therefore, their's was the hand to receive and the hand to pay. It was not obligatory on them to pay the premiums to themselves, no doubt, but they took on themselves the duty to do so. As Mr. Griffith stated in his cross-examination:—"We did not look to Madam O'Donoghue we looked to the receiver."

This course of dealing went on for several years. In the year 1883, it was agreed between the O'Donoghues and the Company that the amount secured by the policy should be reduced by the sum of £1000, as I have before mentioned, and this was effected by an endorsement on the policy, dated the 11th October, 1883, cancelling £1000 of the sum assured, and reducing the half-yearly premium to £32 1s. 1d. No other alteration was made in the course of dealing. The receiver appears to have had no funds available for payment of the £300 a-year after the month of May, 1885, when he made his last payment to the Company. He was discharged in March, 1893, and a private agent was appointed, but he never received any sums applicable to payment of the £300 a-year.

In the account furnished by the Company, copied from the

loan account in their ledger, it appears that no change in the course of dealing was made by the Company after the cessation of the payments by the receiver. The entries continue as before, and the policy was treated as subsisting down to October, 1890, when the last debit of a premium appears. Interest was regularly charged on the unpaid premiums from time to time to that date. Madam O'Donoghue died the 29th October, 1891. There is neither allegation nor proof by the plaintiff that any communication was made to her of any intention on the part of the Company to depart from the course of dealing which had existed from 1876, nor was any application made to her or anyone representing the estate for payment of the premiums after the cessation of payments by the receiver. Her husband died in the year 1889. She may have received the usual half-yearly notices, and probably they were sent to her, but these would have only tended to lead her the more to believe that no change was made, and that the policy was still dealt with as subsisting. No minute of the Company as to deeming this policy lapsed was proved or alleged to have been made.

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I now come to a very important transaction by the Company which I cannot regard without suspicion. They kept a book called the Register of Policies in which was ordinarily entered all the transactions as to each policy by way of record. This policy has its own record there, in which appears an entry as follows: "Claim, 1891." It was proved by Mr. Griffith that the meaning of this is, that the Company had received notice of the death of Madam O'Donoghue, and that this would not have been entered unless the policy was supposed to have been subsisting at her death. It appears to have been entered in the usual course of business, and no evidence was given by the plaintiff to show that it was not so entered. This affords strong corroboration of the inference drawn from the conduct of the Company, that up to the death of Madam O'Donoghue no change had been made by the Company in the course of dealing and that they had treated the policy as subsisting up to her death. But in the same record of this policy, in the Policy Register, there appears in a different handwriting under the words "Claim, 1891," the following entry, "Entered in error, the policy having lapsed." Mr. Griffith stated that he could not say

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when the entry of lapse was made in the Policy Register. On the face of it, it was made after the death of Madam O'Donoghue. The object of this entry was plainly to endeavour to get over the effect of the prior entry and to deal with the policy as a lapsed policy. A good deal of discussion arose between counsel as to the alleged keeping back of this book from the affidavits of discovery, as to which I must say that I am not satisfied as to the excuses made by the plaintiff.

The importance of giving notice to the parties interested, or at least to Madam O'Donoghue, appears still more strongly from the second condition endorsed on the policy which provides that lapsed policies may be revived within a year from the day when the premium became due, on satisfactory proof of the good health, &c. of the person insured, and on payment of all arrears of premium and interest thereon, with a fine of 20s. per cent. of the amount assured. The keeping back from the parties the alleged intention to depart from the course of dealing, and to treat this as a lapsed policy deprived them of the important advantage of availing themselves of this clause.

On full consideration of this part of the case I must hold that the conduct of the Company in treating this policy as lapsed was, under the circumstances, unfair and inequitable. I repeat that I do not form this opinion upon the assumption that there was any obligation on the Company to go on paying the premiums, or rather treating them as paid, after the receiver had ceased to make payments to the Company. But I found my opinion on this, that the Company by their conduct misled the party insured, and did so to their own great advantage. He who seeks equity must do equity, and the Company here has not, in my opinion, done equity in seeking now to treat this policy as lapsed which they induced the parties interested to believe was not lapsed. I cannot avoid coming to the conclusion that the present contention of the Company was an after thought formed after the death of Madam O'Donoghue, which made it their interest to do so.

An offer was made by the plaintiff, during the progress of the trial, to give the defendants a credit for the surrender value of the policy which, in the view I have taken, is but a small portion of the obligation of the Company.

I shall declare that in taking the account on foot of the mortgage the defendants are to be credited with the full amount which would have been payable on foot of the policy, including any bonuses payable in respect of same, as if it were subsisting at the death of Madam O'Donoghue, but that the plaintiff is entitled to credit for all sums which were or would have been due for premiums up to that time with interest.

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The following is the curial part of the judgment :—

“ DECLARE that the annuities of £300 and £500 provided by the settlement of the 9th February, 1858, for the said Mary O'Donoghue, as therein mentioned, were well charged on the fee and inheritance of the lands comprised in said settlement.

“ Declare that the amount recoverable on foot of arrears of the said annuity of £300 should not be limited to the life of said Mary O'Donoghue or to one year prior to her death.

“ Declare that the said annuities of £300 and £500 have not nor has either of them been released or apportioned between the life estate of Daniel O'Donoghue in the portion of the lands comprised in the said settlement, which was sold in the Court of the Land Judge in O'Donoghue's Estate and the residue of same which remains unsold, but that the entire of said annuities remained charged on the said lands remaining unsold.

“ Declare that on the true construction of the mortgage of the 3rd October, 1876, the same was, in the events that have happened, a security for the principal sum of £1200, and all premiums of insurance payable on foot of said policies, and interest on same respectively, and not for any sums to be thereafter advanced in addition thereto, save £1000 intended therein to be provided for payment of the sum of £1000 due to J. H. Sugrue, on foot of his mortgage in the pleadings mentioned, which last-mentioned sum was not so provided.

“ Declare that in taking the accounts hereinafter directed the plaintiff shall be charged with all moneys which would have been payable by the said Assurance Society, on foot of the policy of assurance in the pleadings mentioned, if the same were a subsisting policy at the death of the said Mary O'Donoghue, but subject to credit against same for all premiums which would have been payable to the said Company up to her death, with interest on the same.

“ Adjourn to Chambers to take the following accounts, having regard to the foregoing declarations, viz.:—1. An account of the

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arrears of the said annuity of £300 from the 31st day of October, 1876, being the date of the plaintiff's mortgage to the 7th October, 1889, being the day of the death of the said Daniel O'Donoghue. 2. An account of the arrears of the said annuity of £500 from the said 7th October, 1889, to the 29th October, 1891, being the day of the death of the said Mary O'Donoghue. 3. An account of the sum due to the plaintiff on foot of the said mortgage of the 31st October, 1876, in respect of the principal sum of £1200 only, and the interest thereof at the rate of six per cent. per annum, and of all sums due to the said Reliance Mutual Assurance Society for premiums in respect of the policy of insurance effected with said society on the life of the said Mary O'Donoghue, with interest on such premiums at the same rate. 4. An account of all sums received by the said plaintiff or the said Insurance Society on foot of the rents of the lands charged with the said annuities from the Receiver appointed over the said lands in the cause of *Nugent v. Sugrue*, or from any other person or persons."

Solicitors for the plaintiffs: *Huggard & Willington.*

Solicitor for the defendant Geoffrey O'Donoghue: *W. P. Kelly.*

Solicitor for the trustees: *L. C. P. Smith.*

Solicitors for the minor defendants: *D'Alton & Co.*

T. H. M.

SHAFTESBURY v. WALLACE.

(1896. No. 393.)

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1897.Jan. 13, 15.
Feb. 11.

Reservation of all mines of lead, ore, tin, and other minerals—Ejusdem generis
—Brick clay—Manufacture and sale of bricks—Levelling land for building
—Waste.

A lease for lives renewable, made in 1829, and a fee-farm grant, into which it was converted in 1881, reserved all mines of lead, ore, tin, and other minerals, coal, and all quarries of marble, freestone, limestone, and building stones, slates, and other quarries whatsoever (save so much as might be used for building or improvement on the premises), as also all marl, fuller's earth, . . . bogs, turf, mosses, and turbaries. Power was given to the landlord to bore, search for, dig, and carry away bog timber, mines, minerals, marble, coal, freestone, marl, building-stone, limestone and slate, fuller's earth . . . and turf:—

Held, that brick-clay lying some fifteen inches beneath the surface was included in the reservation.

A sub-grantee, bound by covenant in his sub-grant to build on the premises, commenced to cut away the clay, and to manufacture same into bricks, large quantities of which he sold to be used off the premises, alleging that the cutting away and removal of the clay was the proper manner of levelling the land, which was on a hillside, for building. On the assumption that the clay was not included in the reservations in the head lease and grant:—

Held, to constitute waste, which should be restrained by injunction.

ACTION for a declaration that the plaintiffs were entitled under two fee-farm grants, dated the 2nd June, 1881, to all mines of lead, ore, tin, and other minerals in and upon the premises thereby granted; and that on the true construction of the exceptions and reservations contained in the said grants, all brick-clay on and under the said premises was reserved to the grantor, and that same was then vested in the plaintiffs, and that they were entitled to work the same; and for an injunction to restrain the defendants from working the said brick-clay, or converting the same to their own use, or depriving the plaintiffs of the same; and for damages.

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By indenture of lease (1) dated the 4th March, 1829, George Augustus, Second Marquis of Donegall, demised to John Wallace, his heirs, and assigns, all that farm or tenement, being part of the townland of Ballyaghagan, containing 78A. 3R. 30P. plantation measure, together with one full and undivided moiety of the mountain in the said townland, and which said mountain contained 128A. 1R. 30P. like measure, and all houses, edifices, and buildings which then were, or at any time thereafter should be, thereupon erected and built, which said farm, tenement, and premises were situate in the parish and barony of Belfast and county of Antrim, "except and always reserving out of this present demise, unto the said George Augustus Marquis of Donegall, his Heirs and Assigns, and all and every other person or persons who for the time being shall or may be entitled to the freehold and inheritance of the same premises, immediately expectant on the determination of this demise, all and all manner of Timber and other Trees, Woods, and Underwoods, now growing or hereafter to grow on the said demised Premises, and all Mines of Lead, Ore, Tin, and other Minerals, Coal, and all Quarries of Marble, Free-stone, Lime-stone, and Building-stones, Slates, and other quarries whatsoever, (save so much as may be used for building or improvement on the Premises), as also all Marl, Fuller's-Earth, Gypsum, Jetsam, Flotsam, and Ligan, Bogs, Turf, Mosses, Turbaries, (save so much as is sufficient for consumption, and shall be used on the Premises), and also excepting all Mills, Weirs, Dams, Waters, Water-courses, and all Fishings and Fisheries, free Warrens, free Chase, and all to such Fishings and Fisheries, free Warrens and free Chase belonging, and with full and free liberty from time to time, for him and them, and his and their servants, or any other person or persons, permitted or authorized by writing, under the hand of the said Marquis, or of the person or persons entitled to the freehold or reversion of said Premises, expectant on the determination of this demise, to hunt, hawk, fish, and fowl in and through all said Premises, and to take, kill, or destroy Foxes,

(1) The lease was almost entirely in print. The exception and reservation, and the clause enabling the lessor to search for and carry away minerals, &c. were, save the lessee's name, all in print. These clauses are given in the text *verbatim*, and with the punctuation of the original document.

Hares, and all manner of four-footed and other Game, and Wild-fowl, and to enter into and upon all and every or any part of the said demised Premises, with his and their Servants and Attendants, and with Horses, Dogs, and Guns, Nets or other Engines, in order to search for, take, kill, or destroy Game, Wild-fowl, and Fish, and also excepting and reserving to the said George Augustus Marquis of Donegall, party hereto, and such other person as shall be entitled to the immediate reversion and inheritance of the said premises, as aforesaid, all Waifs, Estrays, Felon's Goods, and all other Royalties or Privileges, in, over, or upon the said Premises, or any part thereof, or belonging or appertaining thereto," to hold for three lives, and such other lives as should be added by virtue of the covenant thereafter contained, subject to a lease dated the 16th April, 1799, from the Marquis of Donegall to William Mac Main, for 61 years, and to the yearly rent of £42 sterling, and £1 5s. on the death of each of the lives thereinbefore named, and to the further yearly rent of 10s. for every acre, plantation measure, that should be ploughed and sown with corn or grain of any kind in any one year during the demise, over and above two-third parts of the arable land thereby demised, and also to the payment of 10s. on the death of the lessee and every other chief tenant dying in possession for and in lieu of an heriot. The lease contained a covenant by the lessor for perpetual renewal, and covenants by the lessee to grind malt, corn, or other grain at the lessor's mill, and at the request of the proprietors or occupiers of the lands adjoining the said premises to join in making sufficient fences and ditches between the said premises and the lands of such tenants or other persons so requesting the same to be made, and every year to make upon such part of the premises as was not already divided by fences into parks and enclosures containing not more than 10 acres plantation measure (except on rocky mountains), 30 perches of a good single earth ditch in straight lines, with a gripe or trench on one side, and to plant or sow the same with white-thorn or crab-tree quicks, or furze, or to make the like number of perches of a good stone wall, until all the said premises should be thereby divided into parks or enclosures, whereof none should contain more than 10 acres plantation measure, and in every year to plant three trees of oak, ash, or elm, along the

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ditches or walls to be made as aforesaid, and to fence and preserve the same from cattle, and to keep open for passengers, horses, carts, and carriages, all roads, ways, paths, and passages, then leading through the premises, and permit new roads, ways, and watercourses to be made in and through the same; and that it should be lawful for the said Marquis, and his assigns, and the other persons entitled to the reversion, and his and their servants, tenants, and workmen authorised by writing, at all times during the continuance of the demise, "to bore, search for, dig, and carry away Bog Timber, Mines, Minerals, Marble, Coal, Free-stone, Marl, Building-stone, Lime-stone and Slate, Fuller's Earth, Gypsum, Jetsam, Flotsam, Ligan, and Turf, in and from any part of the said demised premises, (except Dwelling-houses, Out-houses, or the Gardens, Courts, and Yards thereto belonging); and likewise to cut, bark, strip, cord, coal, work up, and carry away all Timber and Trees excepted out of this demise, except such as have been heretofore planted, and shall be hereafter planted and registered according to Law by the said John Wallace his Heirs or Assigns, and likewise to lay out, make, and cut new Roads, Ditches, Drains, Dams, and Water-courses in and through the said demised premises, or any part thereof, to or from the adjacent Lands and Tenements, and also to amend, repair, scour, and cleanse the same from time to time, as often as he or they shall think fit, making or allowing unto the said John Wallace his Heirs or Assigns, reasonable amends and satisfaction for the damage that shall be done to the soil thereby." The lease also contained a covenant by the lessee to keep in repair the houses, buildings, fences, and other improvements already built and made, or which should thereafter be built and made on the premises; and a covenant by the lessor not to cut down timber, trees, wood, or underwood on the premises that theretofore had been planted, or should thereafter be planted thereon by the lessee, his heirs, or assigns, and that the lessee, his heirs, and assigns, and his and their undertenants of the premises, should be allowed to cut and take upon the premises by appointment of the lessor, his heirs, and assigns, timber or underwood sufficient for repairing the said buildings, and the several purposes of husbandry, to be used upon the said premises only, if so much could be had thereon.

By another indenture of lease, also dated the 4th March, 1829, the Marquis of Donegall demised to the said John Wallace all that farm or tenement, being part of the townland of Ballyaghagan, containing 108A. 2R. 25P. plantation measure, and one undivided moiety of the mountain of Ballyaghagan, for lives renewable for ever, subject to a lease, dated the 1st August, 1812, for sixty-one years, and to the yearly rent of £32 6s. 1 $\frac{3}{4}$ d. This lease contained the same exceptions and reservations, and, so far as is material for the purposes of this report, was in precisely the same terms as that already stated.

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George Hamilton, third Marquis of Donegall, became the owner of the reversion expectant on the said leases within the meaning of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), and William Nevin Wallace became the owner of the said leases within that Act.

By two indentures of fee-farm grant (1), dated the 2nd June, 1881, the said third Marquis granted to the said William Nevin Wallace, in fee-farm, the premises comprised in the said leases respectively, excepting portions thereof taken by the Belfast and Cave Hill Railway Company. These fee-farm grants contained exceptions and reservations, and clauses and covenants, for the purposes of this report, identical with those contained in the said leases. The rents reserved were £42 2s. 6d. and £32 8s. 8d. respectively.

Portion of the Donegall estates, including the above mentioned premises, became vested in the Countess of Shaftesbury for life, with remainder to her son the Earl of Shaftesbury for life, or until certain events, with remainder, on the determination of his estate during his life, to Lord Rowton and the Earl of Clanwilliam during the life of the said Earl of Shaftesbury, with remainders over. These parties were the plaintiffs in the action.

The grantee's estate, under the fee-farm grants, became vested in William Francis Annesley Wallace, and he and John Frazer were the defendants.

The statement of claim stated the leases of the 4th March, 1829, and alleged that at the time of the execution thereof the

(1) These documents were in writing.

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lands therein comprised consisted of pasture and meadow, and arable land, and had been, until the acts complained of, used and enjoyed by the lessees consistently with the purpose for which the leases were made: the lands adjoined the demesne of the Countess of Shaftesbury, upon which Belfast Castle was built. It stated the derivative title of the plaintiffs, and the fee-farm grants of the 2nd June, 1881, and alleged that the defendant Wallace had made lettings to his co-defendant of portions of the premises for the purpose of working the brick-clay thereon, and converting the same into bricks and tiles and similar articles, for the purposes of sale, and, notwithstanding cautionary notices, the defendants removed the surface soil from portions of the lands, and raised and took clay therefrom, for the manufacture of bricks, and converted same to their own use, and commenced the manufacture of bricks on the premises. The plaintiffs charged that such raising of clay and manufacture of bricks were in direct violation of the provisions of the fee-farm grants, and were causing permanent and serious injury to the estate of the plaintiffs, and were acts of waste. The plaintiffs claimed a declaration that they were entitled to all mines of lead, ore, tin, and other minerals on the premises comprised in the fee-farm grants, save so much as was sufficient for consumption, and should be used on the premises thereby granted, and that the brick-clay was reserved to the grantor, and was vested in the plaintiffs, and that they and not the defendants were entitled to work the same, making compensation for damage to the grantee; and an injunction and damages, as in the writ.

The defence submitted that the brick-clay, or ordinary clay worked from the surface, and used for making bricks, was not under the terms of the leases reserved to the lessor. In paragraph 2 it denied that at the time of the execution of the leases the lands consisted of pasture, meadow, or arable land only; and alleged that the lands were situate immediately adjoining the City of Belfast, which at the date of the leases was rapidly extending in the direction of the lands; that it was then and still continued to be an ordinary mode of user for lessees of lands of like quality and description held of the same lessor, and for the same term, and subject to the same reservations and exceptions, and situate

in the vicinity of said lands, to use their lands by cutting away the clay from the surface, and manufacturing the same into bricks, which were required for buildings in the locality, and so developing the lands for building sites; that in the present case it was necessary to cut away the clay for the purpose of developing the lands as building sites, which was the natural and ordinary use of said lands: that the second Marquis made numerous leases from the year 1822 of lands in the vicinity of those in question, and subject to the same reservations and exceptions, yet the lessees thereunder had, without interruption, and to the knowledge of the lessors, cut the clay off the demised lands for the purpose of making brick and developing the lands for building sites as they became available as such; and that the lessor or his successors never at any time alleged that such user was not a lawful user, or an infraction of the lessor's rights, or a breach of the terms of the leases, or that a reservation in the same terms as that now relied on gave the lessor a right to the brick-clay on the lands demised. The defence admitted that the defendant Wallace had made a sub-grant to the defendant Frazer. This was a sub-grant of portion of the premises in the first-mentioned lease of the 4th March, 1829. The defendant Wallace denied that it was for the purposes alleged, or for brick-making, he made the sub-grant. The defence further alleged that the lands demised were suitable for, and could be much more advantageously used as, building sites than for any other purpose, and that any clay raised or taken away from the lands was required to be taken away for the development and beneficial use and enjoyment of the lands, and making the same available for building, and the value of the lands and of the plaintiffs' estate and interest therein was thereby increased. The defendants further denied that the raising of clay and manufacture of bricks, as exercised by the defendants, or either of them, was a violation of the provisions of the leases or fee-farm grants, or that the acts of the defendants were causing, or were likely to cause, permanent or any injury to the lands or to the estate of the plaintiffs therein, or were acts of waste.

By the sub-grant, which was dated the 18th March, 1896, the defendant Wallace granted to the defendant Frazer part of the lands of Ballyaghagan, containing 15A. 0R. 14P. statute measure,

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excepting and reserving thereout all such matters and things as were excepted and reserved in and by the fee-farm grant under which the said Wallace held, to hold in fee-farm at the yearly rent of £201 12s. 2d. The deed contained a covenant by the grantee that he would, within two years from the date thereof, lay out and expend the sum of £1500 at the least, and would within seven years from the date thereof expend the further sum of £1000, and would within ten years from the date thereof expend the further sum of £1500, all said sums to be expended in the erection of good, substantial, new messuages, dwelling-houses, shops and outoffices, or other good and substantial buildings, upon the said granted premises, same to be finished and completed on proper foundations in a proper and workmanlike manner, and also such conveniences and sewers as should be necessary and proper to be used with such buildings, for rendering the same commodious, and according to plans and elevations to be previously approved of in writing by the grantor, his heirs or assigns, or his or their agent, and that every messuage, dwelling-house, or shop or building to be built or erected on the premises should each be of the annual value, according to the Poor Law valuation, of £15 at least; and that he would not carry on or permit to be carried on on the premises any noisy, noisome, noxious, or offensive trade, business, or manufacture, and should not use or permit to be used the said premises or any part thereof for the sale of intoxicating liquors, without the consent in writing of the grantor, or do or suffer to be done thereon any act or thing whatsoever which might be or become an annoyance or disturbance to the grantor, his heirs, or assigns, or his or their tenants or grantees in the neighbourhood. Provided that nothing therein contained should be held to prevent the grantee, his heirs or assigns from using the said premises for fifteen years from the date thereof, but no longer, as a brickfield, and with all necessary machinery, plant, and appliances, for the manufacture of the clay, and other materials to be gotten from said premises, into bricks, tiles, and other ware. Provided that the grantee, his heirs, and assigns should at all times carry on the works thereby authorized in a proper and workmanlike manner, and keep indemnified the grantor, his heirs and assigns from and against all actions, claims,

and demands for or by reason of any injury to adjoining property, or any nuisance or annoyance arising from the carrying on of the said works. And the grantee also covenanted not to erect on the said premises a tall chimney or shaft, except at a distance of at least 700 feet from the county road forming the south-western boundary of said lands. The deed also contained a covenant by the grantee to insure all buildings, &c., from loss or damage by fire, in a sum equal to the amount of twenty times the annual Poor Law value of such buildings, &c., provided that he should not be required to have such insurance to a greater amount than £4000.

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The premises comprised in this sub-grant were portion of those comprised in the first-mentioned lease of the 4th March, 1829, and the fee-farm grant into which the same had been converted.

The lands were situate north of Belfast, about two-and-a-half miles from its centre, on the slope of the Cave Hill, and adjoining the demesne of the Countess of Shaftesbury. The Antrim-road went through the lower portion of them. The new municipal boundary which was soon to come into operation would pass through the lands near the Antrim-road, enclosing a small portion thereof, but excluding all the premises comprised in the sub-grant.

Evidence for the plaintiffs went to show :—The lands had been used for grazing, meadowing, and agricultural purposes. When the surface had been removed to a depth of about 15 inches the clay would be reached. There were limestone quarries on the lands which were worked for twenty years by the late Lord Donegall, and subsequently by his executors. A claim was made by Wallace some time after 1883 for surface injury, and some hundreds of pounds compensation were paid. There never were any brickfields on Ballyaghagan. Recently the ground on Frazer's land was cut up, and opened for making bricks; a shed 112 feet long, and an engine were erected; there was another shed for a brick making machine, and kilns; tramway rails were laid to where the clay was being excavated; there were excavations in one place to a depth of 12 feet; some 2642 cubic yards of clay had been removed, representing about one million bricks: the land was in the same condition as it was twenty or thirty years ago.

V.-C. except for the brickyard, and a house in course of construction on
 1897. the lower side near the Antrim-road; that was the only building
 SHAFTESBURY in the nature of a house or residence. The excavations would
 v. seriously interfere with the value of the ground for building
 WALLACE. purposes, and also with its value for agricultural purposes, unless
 the clay were respread.

Evidence was given for the defendants to show:—Buildings extended along the Antrim-road almost to the lands in question; the property on that road was developing into a building district; part of Frazer's land would let as building ground; it was suitable for that purpose, but should be cut away. Frazer was making preparations for doing that with a view to building; there was soil over the brick-clay; the latter was being taken out by open cutting, the soil being kept in heaps on the ground; he was removing no more clay than was necessary; he was excavating to obtain a rise of 1 in 20 which would be a suitable slope, and to make an equal surface; to do this a considerable quantity of clay should be removed; at present the rise at the upper part of the land was 1 in 6, or 1 in 7, and in places it was only 1 in 15; what Frazer was doing would develop the land and make it more valuable; it was the ordinary mode of dealing with ground of a similar nature, and preparing it for building ground; he had not cut any portion of the land below the level of the road; none of it was excavated below a uniform level except some 7 square yards which were opened temporarily for the engine; it was still Frazer's intention to carry out the expenditure, and it was not possible to build except on a moderate quantity of the land without cutting it away. The seam of clay ran over the district; it was found round Belfast, sometimes on the surface, but generally from 3 to 18 inches from the top; the usual course was to remove the surface, and then excavate the clay; this was done by open working.

The defendants also proposed to give evidence of other grants from the Donegall family to other parties, containing reservations similar to those in the present case, and to show that the persons holding under those grants manufactured bricks and sold same (see the arguments for the defendants, *post*).

This evidence was objected to by the plaintiffs, and rejected by the Vice-Chancellor.

The Solicitor-General (W. Kenny, Q.C.) (with him *Stanley, Q.C.*,
and *R. F. Harrison*), for the plaintiffs :—

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The plaintiffs contend—(a) that all brick-clay is included in the exceptions and reservations in the leases and fee-farm grants; and (b) that the defendants have committed waste.

The second paragraph of the defence affords no answer in law to the action. It alleges a mode of user by other tenants of other portions of the plaintiffs' property, and even if intended as such, it cannot amount to a valid plea of acquiescence in the present case. In *Willmott v. Barber* (1), Fry, J., states what is necessary to constitute such an acquiescence as would deprive a man of his legal rights, and mentions five essentials, not one of which exists in the present case.

As to the plaintiffs' first contention, the word minerals is a generic term, which *prima facie* includes everything except the mere surface which is used for agricultural purposes: *Midland Railway Company v. Checkley* (2); *Hext v. Gill* (3); *Fishbourne v. Hamilton* (4). In *Hext v. Gill* (3) Mellish, L.J., states (p. 712) the result of the authorities on this question to be that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning. James, L.J., concurs. It may be said that *Hext v. Gill* (3) has been overruled or disapproved of, but it has been recognised in this Court and the Court of Appeal in *Fishbourne v. Hamilton* (4) as a binding authority, and followed in English cases; and the definition given by Mellish, L.J., though the subject of criticism, has been always accepted as correct. See also *Midland Railway Company v. Haunchwood Brick and Tile Company* (5), and the judgment there of Kay, J. That case and *Hext v. Gill* (3) were referred to in *Lord Provost and Magistrates of Glasgow v. Farie* (6), which was the case of common clay, but the substance of the definition of the word minerals given by Mellish, L.J., in *Hext v. Gill* (3) was not dis-

(1) 15 Ch. D. 96.

(2) L. R. 4 Eq. 19.

(3) L. R. 7 Ch. 699.

(4) 25 L. R. Ir. 483.

(5) 20 Ch. D. 552.

(6) 13 App. Cas. 657.

V.-C. approved of. See also *Midland Railway Company v. Robinson* (1),
 1897. and *Earl of Jersey v. Guardians of Neath Union* (2). The latter
 SHAFTESBURY case expressly follows *Hext v. Gill* (3), and Lord Esher, M.R.,
 v. and Bowen and Fry, L.JJ., approve of the rule there laid down,
 WALLACE. and state their opinion that that case had not been overruled. If,
 therefore, the exceptions here were simply of mines and minerals,
 there would be no doubt that brick-clay was included therein.

It may, however, be contended, that by the mention of ore and tin, the meaning of the word minerals must, by the application of the *ejusdem generis* rule, be restricted in this case; and, further, that the express reservation of such substances as marl, fuller's earth, bogs, &c., is an indication that brick-clay was not intended to be reserved. Such a general word as minerals cannot, however, on the context here be so restricted, and the onus lies upon the defendants of showing that the intention was that it should not have its ordinary meaning. So far, however, from this being the case, the leases themselves show a contrary intention, for in the clause enabling the landlord to bore, search for, dig, and carry away bog-timber, mines, minerals, &c., he making amends and satisfaction for the damage done to the soil thereby, there is nothing to restrict the meaning of the word minerals, and this clause throws light, if required, on the meaning of the exceptions. As to the *ejusdem generis* doctrine, the modern tendency is to reject a restricted construction: see 1 Jarm. Wills (5th ed.) 709, note (o); *Mullally v. Walsh* (4); *Anderson v. Anderson* (5); *Attorney-General v. Welsh Granite Company* (6); *Pembroke v. Warren* (7). See further on the foregoing questions, Cherry's Land Acts (2nd ed.), pages 46, 47, notes to sect. 26 of the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), where the result of the cases on the construction of the words mines, minerals &c., is stated.

Secondly, assuming that the exception does not include brick-clay, the defendants have committed waste: *Bishop of London v.*

(1) 15 App. Cas. 19.

(2) 22 Q. B. D. 555.

(3) L. R. 7 Ch. 699.

(4) 3 L. R. Ir. 244.

(5) [1895] 1 Q. B. 749.

(6) W. N. 1887, p. 86.

(7) [1896] 1 Ir. R. 76.

Web (1); *Gore v. O'Grady* (2); *Coppinger v. Gubbins* (3), which was approved of by the House of Lords, in *Doherty v. Allman* (4); *Templemore v. Moore* (5). Compare sections 25, *et seq.*, of the Act of 1860, which now, in the cases to which they apply, principally determine the rights of landlord and tenant in these matters.

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The defendants have altered the character of the holding, changing agricultural and pastoral land into a brickfield: see *Brooke v. Mernagh* (6); *Brooke v. Kavanagh* (7).

Gordon, Q.C., and *Meredith, Q.C.* (with them *Hume*), for the defendants:—

The exceptions here are divided into four compartments:—
(a) timber, trees, &c.; (b) mines of lead, ore, &c.; (c) quarries of marble, freestone, &c.; (d) marl, fuller's-earth, &c. It is not the case of an exception of mines and minerals. In the second compartment the controlling words are, "mines of," and they apply to all that follows in that class. "Minerals" are not excepted; the exception is of "mines of minerals." Even, therefore, if brick-clay were a mineral within the meaning of an ordinary exception of mines and minerals, it does not come within the exception here, as only minerals obtained by mining are excepted. If this is not the true construction, there would have been no necessity to specify marl and fuller's-earth in class (d), as, on the plaintiffs' argument these substances would have been already excepted as minerals. The word "mines" is used in its strict sense, in contradistinction to "quarries." Previous to the decision in *Hext v. Gill* (8) no person would have contended in this country that such a substance as brick-clay was included in an exception such as that here. See *Brown v. Chadwick* (9), *Darvill v. Roper* (10). In *Hext v. Gill* (8), *Midland Railway Company v. Checkley* (11), *Fishbourne v. Hamilton* (12), and *Earl of Jersey v. Guardians of Neath Union* (13), the exceptions were of mines and

(1) 1 P. Wms. 527.

(2) Ir. R. 1 Eq. 1.

(3) 9 Ir. Eq. R. 304.

(4) 3 App. Cas. 709.

(5) 15 Ir. C. L. R. 14.

(6) 23 L. R. Ir. 86.

(7) *Ibid.* 97.

(8) L. R. 7 Ch. 699.

(9) 7 Ir. C. L. R. 101.

(10) 3 Drew. 294.

(11) L. R. 4 Eq. 19.

(12) 25 L. R. Ir. 483.

(13) 22 Q. B. D. 555.

V.-C. minerals; and the decision in *Hext v. Gill* (1) was that those
 1897. words included everything underneath the surface, unless there
SHAFTESBURY was something to give them a more limited meaning, and that
v. there was nothing there to restrict their ordinary signification.
WALLACE. See the judgment of Mellish, L. J., page 713. That case is not
 an authority against the defendants. So also in *Fishbourne v.*
Hamilton (2) it was held that there was nothing to restrict the
 context. Here the exception is quite different: the word "mines"
 signifies workings under ground: *The King v. Brettell* (3), where
 Lord Tenterden, C.J., referring to *Rex v. Sedgley* (4), says: "Now
 that case establishes that, in order to determine whether an exca-
 vation in the earth constitute a mine or not, we are to look to
 the mode in which the article is obtained, and not to its chemical
 or geological character"; and Littledale, J., says that the mode
 in which the substance is obtained decides the question. See also
Bell v. Wilson (5), where Turner, L. J., after referring to a de-
 rivation and meaning given for the word mine, states that the cases
 of *Rex v. The Inhabitants of Sedgley* (4) and *Rex v. Brettell* (3) seem
 to him to support that definition to this extent, at least, that mines
 are underground workings. In *Midland Railway Company v.*
Haunchwood Brick and Tile Company (6) Kay, J., says:—"The
 primary meaning of the word 'mine' standing alone is an under-
 ground excavation made for the purpose of getting minerals, as
 in *Bell v. Wilson* (5)."

In *Farie's Case* (7) the words were very like those in the
 present, and that is a clear authority for the defendants. See
 the judgment of Lord Halsbury, L. C., where (page 672), he
 quotes the language of the Lord Ordinary. See also Lord
 Watson's judgment, page 675, where he says that "mines"
 and "minerals" are not definite terms: that they are suscep-
 tible of limitation or expansion, according to the intention with
 which they are used. Again, at page 676, referring to the Acts
 there in question, he says:—"The difficulty which I have felt in
 construing their enactments is due to the fact that they do not

(1) L. R. 7 Ch. 699.

(5) L. R. 1 Ch. 303.

(2) 25 L. R. Ir. 483.

(6) 20 Ch. D. 552.

(3) 3 B. & Ad. 424.

(7) 13 App. Cas. 657.

(4) 2 B. & Ad. 65.

deal with 'minerals' as something which may be different from and additional to 'mines.' They do not except mines and minerals, but mines of coal, ironstone, slate, and other minerals; that is to say they only except minerals which when worked will constitute 'mines' within the meaning of section 18 . . ." And (page 679) he says that his present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Lord Herschell, also, who dissented from the judgment, points out (page 683) that the things there reserved were "any mines" of coal, &c.; and Lord Macnaghten says (page 686) that the exception comprehends mines of all sorts—mines of coal, ironstone, and slate, and mines of other minerals—but nothing else; and in the following pages he gives his views on the meaning of the word "mines," referring to the judgment of Kay, J., in *Midland Railway Company v. Haunchwood Brick and Tile Company* (1). Three of the Lords advert to the fact that the exception was of mines of minerals. So, in *Midland Railway Co. v. Robinson* (2), Lord Herschell retains the opinion he expressed in *Farie's Case* (3), and, after doubting whether much assistance was to be obtained from cases of agreements between parties unaffected by any statutory enactment, continues (page 27):—"In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed." Lord Macnaghten dissented, adhering to the views he expressed in *Farie's Case* (3), and Lord Watson's judgment is based on the *ejusdem generis* rule.

In *Earl of Jersey v. Neath Union* (4) Lord Esher, M. R., referring to *Farie's Case* (3), points out that the words there were "mines of minerals" and not "mines and minerals," as in the case then before the Court. We take the same distinction between *Farie's Case* (3) and the present on the one side, and the cases relied on by the plaintiffs on the other, and we have the high authorities we have referred to for the effect of that distinction. In *Earl of Jersey v. Neath Union* (4) it was held that there was nothing in the context to qualify the wide words of the reservation.

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(1) 20 Ch. D. 552.

(3) 13 App. Cas. 657.

(2) 15 App. Cas. 19.

(4) 22 Q. B. D. 555.

V.-C. Bowen, L.J., referring (page 561) to the rule laid down in *Hext*
 1897. v. *Gill* (1) points out that it is merely a working canon to enable
 SHAFTESBURY the Court to arrive at the meaning of a document, and says that
 v. WALLACE. it is to be observed that it admits of being modified by the
 contents of the document itself. Fry, L.J., shows (pages 565, 566)
 the effect to be given to the word "whatsoever" which occurred
 in that case. In the present case substances of the same character
 as brick-clay are expressly mentioned in the reservation; but
 brick-clay is not included, and the word "whatsoever" occurs
 only in connection with quarries. Brick-clay is the ordinary clay
 near Belfast.

Here in the subsequent clause in the lease there is a provision that amends are to be made to the lessee for damage done to the soil. The soil belongs to him and it includes the clay. Moreover that clause shows that it was not intended that the lessor should be entitled to carry off the entire surface, and it would be unreasonable to suppose that it was intended to reserve to him what he could not remove except by so doing: see *Hext v. Gill* (1); or that he should be entitled to cut away all the brick-clay, making compensation only for surface damage. There is no clause giving compensation save that for damage to the soil. The 1st paragraph of the claim admits a right in the defendants to the clay, and if all the bricks made were used for building on the demised premises the plaintiffs on their own pleading would be out of Court. See also *Tucker v. Linger* (2), on which plaintiffs' counsel state they intend to rely, at page 25.

As to the mode of user of other portions of the property held under similar leases, see *Attorney-General for the Isle of Man v. Mylchreest* (3). In *Tucker v. Linger* (2) the custom was held valid notwithstanding the reservation, and moreover that case is of importance from the judgment of Kay, J., who decided *Midland Railway Co. v. Haunchwood Brick and Tile Co.* (4), relied on by the plaintiffs. See pages 24 and 25, where, dealing with the question of the custom, he refers to *Attorney-General for the Isle of Man v. Mylchreest* (3).

(1) L. R. 7 Ch. 699.

(3) 4 App. Cas. 294.

(2) 21 Ch. D. 18. In House of

(4) 20 Ch. D. 552.

Lords—8 App. Cas. 508.

The clause as to boring, &c. is merely ancillary to the reservation, and cannot extend the enumeration of things excepted, or the meaning to be given to the language used in the exception.

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As to the *ejusdem generis* rule the authorities on this subject were considered in *Pembroke v. Warren* (1). The rule was there recognized as a general rule of construction, but the Court found that in that case the trades, &c. enumerated were so different that it was impossible to find anything in common between them except the fact that they were offensive or noisy: see the judgment of this Court, page 92. There, moreover, the word "whatsoever" occurred. In the present case, the things enumerated in the second compartment are all metalliferous, except coal, which follows the words other minerals, and after that come quarries of marble, &c.

With regard to the allegation of waste the action is not framed as an action of waste. Further, the acts relied on could amount at most to meliorating waste. The defendants have the fee, and there is no injury to the plaintiffs, and they are not entitled to an injunction: *Doherty v. Allman* (2), *Grand Canal Company v. M'Namee* (3). There is no covenant against building. *Brooke v. Mernagh* (4) and *Brooke v. Kavanagh* (5), were decided on the ground that a serious injury was being done to the landlord and that the huts were a standing menace to him; and in the judgment of this Court in the former case (page 95), after a reference to the power of the Court to restrain a material change in the nature of the demised premises, it is laid down:—"That power is discretionary, and should not be exercised when the injury complained of is of a trivial nature, or when the alteration works no substantial injury to the lessor." Here the plaintiffs' estate will be much improved by the buildings. See further *Jones v. Chappell* (6) and the observations of Jessel, M.R., during the argument (page 540). In his judgment, he says (page 541), "As I understand the law, the erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance." In

(1) [1896] 1 Ir. R. 76.

(2) 3 App. Cas. 709.

(3) 29 L. R. Ir. 131.

(4) 23 L. R. Ir. 86.

(5) *Ibid.* 97.

(6) L. R. 20 Eq. 539.

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Coppinger v. Gubbins (1) the removal of the peat was solely for the purposes of sale, and not with the object of improving the land. So in *Gore v. O'Grady* (2). Here the sub-grant excepts everything reserved in the head grant, and it is manifest Wallace believed he had a right to make the former. A substantial rent is reserved in perpetuity, the right of brickmaking is limited to fifteen years, and there are covenants to lay out large sums in building. The Act of 1860 has no application, having regard to the date of the leases.

Stanley, Q.C., in reply :—

The fact that this is a case between landlord and tenant must not be overlooked. The principles that are to be applied to the construction of a lease, and to a sale of the fee-simple of lands under a private deed, or by virtue of an Act of Parliament, are very different. In construing a reservation of mines and minerals regard must be had to the relative position of the parties interested, and to the nature of the transaction, as well as to the words used to describe the reservations. Here the surface of the land alone has been demised ; the lease is of an ordinary agricultural holding. For nearly seventy years it was used as such by the predecessors in title of the present owner, without interference with, or any claim being made to, the brick-clay thereunder. If it had not been for the decision in *Farie's Case* (3), what doubt could there be, on the language of the lease, that the intention of the parties was to give the lessee the use and enjoyment of the surface only of the lands, for the purposes of agriculture or pasture, and to reserve everything else to the landlord. However inartistically the lease was framed, this appears to be the dominating idea in the mind of the draftsman. The provisions of the lease show that the lands were let as an ordinary farm, and the user since has been in accordance with this intention. When the lease was converted into a fee-farm grant, the reservations, which might have been made the subject of special arrangement between the parties (see section 4 of the Renewable Leasehold Conversion Act), were reinserted in their entirety, and the fee-farm grant contains the

(1) 9 Ir. Eq. R. 304. (2) Ir. R. 1 Eq. 1. (3) 13 App. Cas. 657.

same exceptions and reservations as the lease itself. If the defendants' contention, that the reservation should be read, mines of lead, mines of ore, and mines of other minerals, were right, the rule should apply to the portion of the reservation dealing with quarries, and that would read quarries of marble, quarries of freestone, . . . and quarries of other quarries, which would be absurd. Neither *Hext v. Gill* (1), nor *Fishbourne v. Hamilton* (2), was as strong on the facts for the plaintiffs as the present case. *Fishbourne v. Hamilton* (2), was the case of a grant in fee-farm at Common Law, and not a lease. In *Tucker v. Linger* (3), where all "mines and minerals, sand, quarries of stone, brick, earth, and gravel pits," were reserved to the landlord, and the tenant established a custom for the tenants to remove and sell "flints," which came to the surface in the ordinary course of agricultural operations, Cotton, L.J., in the course of his judgment says:—"It would require some very strong evidence to satisfy me that where land is let to a tenant for a particular purpose and to make a profit by it in that way, he is recognised as being at liberty to use it in another and a different way for the purpose of making a profit." And after commenting on the language of the reservation, he held that, if there were no such custom as alleged, the agreement would preclude the tenant from carrying away flints. Here the tenant seeks to make profit out of the lands in a way which was clearly never contemplated when the lease was granted. That case was taken to the House of Lords (4), and there the decision was based on the custom, and did not touch the meaning given to mines and minerals in the Court below. The facts of *Farie's Case* (5), upon which so much reliance is placed by the defendants, were exceptional. The land was purchased for the express purpose of constructing thereon reservoirs, and this was known to the vendor, who was also aware that the existence of clay below the surface was the principal inducing cause for the appellants making their purchase. Moreover, the decision depended on Scotch law. Lord Halsbury, L.C., in his judgment expressly states (page 671) that he is called upon to construe the words of the grant, "with

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(1) L. R. 7 Ch. 699.

(4) 8 App. Cas. 508.

(2) 25 L. R. Ir. 483.

(5) 13 App. Cas. 657.

(3) 21 Ch. D. 18.

V.-C. reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and having relation to Scotch land and Scotch mines or minerals." He, subsequently, refers to the Scotch case of *Lord Breadalbane v. Menzies* (1), as a binding authority. In that case it was held that the words, "haill mines and minerals of whatsoever nature or quality," did not include a vein of stone suitable for building. *Farie's Case* (2) was considered in *Midland Railway Company v. Robinson* (3), and in *Fishbourne v. Hamilton* (4).

On the question of waste we rely on *Coppinger v. Gubbins* (5), referred to by Lord Blackburn, in *Doherty v. Allman* (6), and *Gore v. O'Grady* (7). The fee-farm grantee in this case is impeachable for waste, as the lease was before the Act of 1860 : see section 25.

Feb. 11.

THE VICE-CHANCELLOR :—

This action is brought by the successors in estate of George Augustus, second Marquis of Donegall, the lessor in two leases for lives renewable for ever, dated the 4th March, 1829, to John Wallace, converted into fee-farm grants under the Renewable Leasehold Conversion Act, against William F. A. Wallace who is now seized of the interest of the grantee, and the defendant Frazer, who is a sub-lessee of a part of the lands so granted to Wallace, to obtain a declaration that upon the true construction of those grants all brick-clay on and under the premises thereby granted is reserved to the grantor, and that the same is now vested in the plaintiffs, and that they and not the defendants are entitled to work the same, making compensation for damage caused to the grantee ; and for an injunction to restrain the defendants from working the said brick-clay and converting same to their own use, or depriving the plaintiffs of the same.

The claim contains a very brief statement that the acts complained of are acts of waste, but it prays no separate relief on

- (1) 1 Shaw Ap. 225.
- (2) 13 App. Cas. 657.
- (3) 15 App. Cas. 19.
- (4) 25 L. R. Ir. 483.

- (5) 9 Ir. Eq. R. 304.
- (6) 3 App. Cas. 709, at p. 734.
- (7) Ir. R. 1 Eq. 1.

this head, and leaves it to come in under the general terms of the prayer for the injunction and the account of damages.

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The plaintiffs' case, however, was put forward separately as to these two subjects—first as to the rights of the respective parties under the deeds of grant; and secondly, as to the general claim for waste arising from the relation of grantor and grantee independently of the ownership of the brick-clay.

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There were two leases of adjoining portions of Lord Donegall's estate made by the then Marquis in the year 1829 to John Wallace for lives with covenant for perpetual renewal, both in the same terms, and in fact on a printed form apparently then in use upon the estate. They granted to the lessee the demised premises, being portions of a denomination called Ballyaghagan, except and reserving all timber and other trees growing on the lands, and all mines of lead, ore, tin, and other minerals, coal, and all quarries of marble, freestone, limestone, and building stones, slates, and other quarries whatsoever, save so much as may be used for building or improvement on the premises, as also all marl, fuller's-earth, gypsum, &c., bogs, turf, mosses, turbaries (save, &c.) To hold the said farm and premises, with their appurtenances, to John Wallace, his heirs and assigns, for three lives therein named, with a covenant for perpetual renewal. The leases subsequently contain a covenant that it should be lawful for the grantor and his servants at all times during the demise to bore, search for, dig, and carry away, bog-timber, *mines, minerals*, marble, coal, freestone, marl, building stone, limestone and slate, fuller's-earth, turf, &c. in and from any part of the demised premises, except dwellinghouses, outhouses, or the gardens, courts, and yards thereto belonging, &c. making or allowing to the lessee reasonable amends and satisfaction for the damage that should be done to the soil thereby.

The first question to be decided arises on the construction of the fee-farm grants from the Marquis of Donegall to Mr. Wallace, which must be read in connexion with the leases for lives renewable for ever, which were converted thereby into estates in fee. The reservations and exceptions in the leases are identical with those contained in the fee-farm grants. The words of the reservation on which this question arises are—"all mines of lead ore tin

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and other minerals, coal, and all quarries of marble freestone limestone and building stones slates and other quarries whatsoever, save so much as may be used for building or improvement on the premises."

The plaintiffs contend that brick-clay is a mineral within the terms of this reservation, which the defendants deny. I think it must be now assumed, notwithstanding some doubts that have existed on the subject, that the word "minerals" in a deed uncontrolled by any restrictive context, or by the nature of the transaction, or by custom, was correctly interpreted by Mellish, L. J., in *Hext v. Gill* (1). I had occasion to express my opinion on the binding authority of that case in *Fishbourne v. Hamilton* (2), and the Court of Appeal concurred in this view. Nothing has since then occurred to detract from its authority. Brick-clay is, therefore, a mineral, unless there be some such ground for preventing it from being so construed. There is nothing in the present case to restrict its ordinary meaning, except the context of the instrument, if that is sufficient for the purpose. The defendants rely upon the word minerals in the reservation being preceded immediately by the words "mines of lead ore tin and other," and say that the sentence is to be read as if it were all mines of lead, all mines of ore, all mines of tin, and all mines of other minerals and all mines of coal. This they describe as one compartment of the reservation. Quarrying they describe as a separate compartment. They draw from this an inference that the expression "mines of other minerals," restricts the general word minerals to minerals that can be obtained by mining only, and that as brick-clay is ordinarily, if not always, obtained by digging away the upper surface of vegetable mould and then digging out the brick-clay it is not a mineral to be obtained by mining.

"Mines of minerals" is a somewhat inaccurate expression. Every mine must be a mine of minerals, but every mineral is not necessarily found in a mine. "Minerals" is not restricted by being coupled with mines in the ordinary expression "mines and minerals." The word "mine," though primarily meaning an underground chamber in which minerals lie, has long since been

(1) L. R. 7 Ch. 699.

(2) 25 L. R. Ir. 483.

extended to mean the mineral substances lying in mines, and is equivalent to a seam or bed of a particular mineral. A similarly inaccurate expression is found in the next clause of the reservation, namely, "all quarries of marble freestone limestone and building stones slates and *all other quarries whatsoever*," which if construed in the same way, would come out as "all quarries of other quarries." The plaintiffs contend with much force that the proper construction would be to connect "all mines" in the earlier place with "lead" only, and read it as if it were worded "all mines of lead, all ore, all tin, and all other minerals," and to connect "all quarries" in the following clause with marble only, and read it as if it were "all quarries of marble, all freestone, all limestone and building-stones, all slates, and all other quarries." There is nothing on the face of the deed, or in the nature of the transaction, showing any reason for excluding from the reservation such minerals as may be, and ordinarily are, won by digging through the surface. On the contrary, the deed contemplates that digging for minerals may be resorted to. This appears from the clause of entry to bore, search for, *dig*, and carry away bog-timber, *minerals*, marble, coal, freestone, marl, &c., from any part of the demised premises, except dwelling-houses, &c., making reasonable amends and satisfaction for the damage that should be done to the soil thereby. In this clause taken by itself there is nothing to limit the legal meaning of the word "minerals" as laid down in *Hext v. Gill* (1), to substances obtained by mining proper. The word "dig" in its grammatical construction applies to all the substances there enumerated. There are no words of reference to those contained in the previous reservation. If these latter were clearly confined to minerals obtained by mining in its limited sense, then the words in the clause of entry would be cut down to the substances mentioned in the reservation, but when the words "other minerals" in the reservation are not only capable of being interpreted in the full sense, but are in the absence of sufficient context so to be construed, I do not think that the words in the clause of entry are to be deprived of their legal meaning in that clause, and if this be so they react upon the

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words in the reservation, and support the arguments for giving these latter their extended meaning. The part of the reservation which applies to quarries appears to me to include plainly all substances won by quarrying, and this also tends to show that the clause as to mining, which it immediately follows and closely resembles in its structure, should be construed in a similar sense. I found upon inspection of the original leases which are on a printed form, and thus have the benefit of punctuation, that a comma is inserted after each of the words lead, ore, tin, and other minerals, a circumstance that favours the plaintiffs' contention as to the grammatical construction.

It was also contended by the defendants that the rule of "*ejusdem generis*," or "*noscitur a sociis*," operates to confine the words "other minerals," but this rule does not find as much favour in recent cases as formerly. This was the opinion of the Court of Appeal in *Earl of Jersey v. Neath Guardians* (1). I had occasion to consider it in the case of *Pembroke v. Warren* (2), and I adhere to the views I there expressed on the subject. I did not summarily dismiss the application of the rule to that case, for I carefully considered the question, and stated fully my reasons for holding that it did not apply in that case. The conclusion at which I arrived was affirmed by the majority of the Court of Appeal. I do not think that the rule governs the present case. Here the clause begins with the expression of different species of minerals, viz. lead and tin, not a very exhaustive enumeration. It also uses the word "ore," which may probably be construed to mean metalliferous minerals obtained by smelting or other like process from ore, and then adds, "and other minerals," which last words legally include brick-clay, and then follows "coal," and this is followed by what has been called by the defendants' counsel "the quarrying compartment" of the reservation, and after this come "fuller's-earth, gypsum, bogs, turf, &c." I find it hard to find in all this sufficient reason for applying the "*ejusdem generis*" rule. It seems very improbable that the parties intended in this instrument to restrict the important reservation of minerals to those which could be won by mining in its exact sense. I am of opinion that the

(1) 22 Q. B. D. 555.

(2) [1896] 1 I. R. 76.

words "and other minerals" were used to enlarge and not to restrict the subjects of the reservation.

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The principal reliance of the defendants' counsel was upon the use of the expression, "mines of other minerals," which in their view of the grammatical construction of the clause limits, as they say, the words "other minerals" to such as are ordinarily raised by mines in the limited sense of underground workings. Supposing that the defendants' contention as to the grammatical construction of the clause is correct, still I do not think that it deprives the word "mines" of its wider though less accurate signification. But even if I am wrong in this view, I think that the word "minerals" in the present case is not to be thereby restricted. The case of *Midland Railway Company v. Robinson* (1), appears to me to support my view. The words of the Act on which this question arose were "mines of coal ironstone slate or other minerals," which are similar to the words used here. If the expression "mines of minerals" were conclusive on this subject there could have been no controversy in that case on this point. But there it was held by the Judges of the Court of Appeal that the word "minerals" was not thus restricted, Cotton, L. J., says:—"Then it is said that this does not apply to limestone or ironstone, which according to the ordinary course of working would be properly worked by quarrying. That is to say, that these sections do not except or apply to anything which can be properly worked according to the practice of the country by open quarrying. I cannot accede to that." He adds:—"In my opinion those words, although the word 'mines' is not used in a very strict and proper sense as regards working, are used here not to designate the mode of working but that which is in seams or strata so as to be worked, whether by mines properly so-called or by quarrying." He further adds, "that the word 'mines' is an inaccurate expression for minerals in strata, and does not define or restrict the mode of working to that mode of working which is properly called 'mining' as distinct from quarrying," and he therefore disallowed the contention. The other Lords Justices concurred in this opinion.

(1) 37 Ch. D. 386; 15 App. Cas. 19.

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That case was brought to the House of Lords, and was affirmed by a majority of the Lords who heard it; Lord Macnaghten dissenting.

Lord Herschell stated that the principal question was whether beds of ironstone and limestone were "mines of" ironstone and limestone and other minerals according to the true interpretation of the Act on which the question arose, and therefore excepted from the conveyance to the Company. He reviews the arguments based on the intention and true construction of the body of statutes in relation to railways, waterworks, and the like; but it is not necessary for me to deal with these. He says, at page 30, that applying oneself to the consideration of the word "mines," apart from the document or context in which it is found, he could not think that its natural meaning imports such beds or strata of minerals only as are ordinarily got by underground working, and adds, that "If aid is sought from the lexicons, and the definitions there given are reviewed, I do not think they afford support to such a construction." He qualifies this, no doubt, by saying that in contracts between individuals not affected by statutory enactment it is to be assumed that *in the absence of a distinct indication of the contrary intention* it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining unaltered. This qualification prevents his language being used as laying down a general rule as to the construction of such contracts; but still I think that it removes the force of the defendants' contention that the expression of "mines of minerals" concludes the question. Such contracts must be dealt with on the true construction of each instrument, to arrive at which the whole must be taken into consideration. Lord Watson agreed with Lord Herschell in his view of the meaning of mines of minerals. He says, at p. 33—"The real point of difficulty which this case presents is due to the circumstance that the statutory exception is not of 'minerals' but of 'mines of minerals.'" "The appellants maintain that, according to the sound construction of the Act of 1845, no minerals are reserved to the landowner except such as are capable of being 'mined,' using that term in its strictest sense, as signifying operations conducted wholly underground, and not open to the light of

day." He refers to *Farie's Case* (1), in which he came to the conclusion that every substance being a mineral within the meaning of the clauses of the Act is reserved to the owner irrespective of the method by which they may be wrought, and he adheres to that opinion. Lord Macnaghten differed from the opinions of the other Lords; but based his judgment on the operation of the statutes.

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On these grounds I think I am not bound to hold that the words "mines of minerals," if the clause is to be so read, necessarily import that "minerals" is to be restricted in the manner contended for by the defendants. I am of opinion, I repeat, that the construction of these words must depend on the whole deed taken together; and for the reasons I have assigned I have, upon a careful consideration of the entire fee-farm grants, taken in connection with the leases which they converted under the Act, arrived at the conclusion that the plaintiffs are entitled to the brick-clay found on the demised and granted premises. I shall make a declaration of such right in the terms of the prayer, and grant the injunction asked for in respect thereof.

The other relief prayed by the plaintiffs is on the ground of waste which they charge to have been committed by the defendants in digging for brick-clay in several parts of the lands, making it into bricks, and selling large quantities of bricks so manufactured by them to be used off the premises. If I am right in the view I have expressed on the first question this will not be of so much importance, but still it remains a distinct portion of the relief prayed. If my view on the other question be erroneous, still, the plaintiffs may be entitled to relief on the ground of waste. It is therefore necessary for me to consider and decide this question also. The brick-clay was either reserved out of the grant, or it was not. If reserved it was of course waste for the defendants to dig it, manufacture it, and remove it in the form of bricks. But if it was not reserved, then, were the acts complained of waste? The lands were originally leased, and were afterwards granted, as ordinary agricultural holdings, and are now being converted into building sites so far as this is possible. I am relieved from going

(1) 13 App. Cas. 657.

V.-C. into the question whether this in itself is waste, for the plaintiffs
1897. disclaim by their counsel any desire to interfere with building on
SHAFTESBURY the lands. All questions as to meliorating waste and the like
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land for building sites, which must necessarily involve digging
out portions of brick-clay for levelling, and probably also the
right to make bricks to be used in the building of houses. I say
“probably,” because the express permission in the grant to use
certain matters comprised in the reservations in improving the
demised premises cannot in terms be held to apply to a matter
not reserved. If, then, the case had rested there, and if I believed
that the defendants were only preparing the ground for building
sites, and converting the soil into bricks to be used in erecting
buildings thereon, I should, on the strength of the concessions
made by the plaintiffs’ counsel be bound to hold that these acts
cannot be regarded now as waste. But the lease made by the
defendant Wallace to his co-defendant Frazer gives a very dif-
ferent aspect to the case. It was in reality, first, a brick-making
lease, and, secondly, a building lease. On the face of it, it was
made expressly for the purpose of digging brick-clay, burning
bricks, and selling them off the premises for fifteen years, without
any regard to preparing the ground for building houses or restrict-
ing the clay to use in building on the premises. For fifteen years
this right to make bricks was granted, and judging by the progress
already made it is likely that not much of the surface will remain
at the end of that period fit for suitable building or any other pur-
pose, but that the whole will be a waste. Frazer set vigorously to
work as soon as he concluded his agreement, dug the surface
wherever it suited him for making bricks, set up the usual ap-
pliances for the purpose, and began a brisk sale of the bricks he so
made. In a very short time he sold 550,000 off the lands, and
has a large quantity ready for sale. He admitted that he intended
to sell the bricks to any one wanting them, and that he had not
any plans for building yet prepared; that he took the place for
brick-making for fifteen years; and that any of it not fit for that
he intended to build on. There was conflicting evidence as to the
present condition of the land, but I am of opinion that the evidence
of Mr. Caldwell gives the true description of it. As to the con-

tention of the defendants that the terms of Frazer's lease and the covenants therein contained afforded a protection to the plaintiffs, I cannot see any grounds for this argument. There was no contract between him and the head landlord.

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I am accordingly of opinion that the defendants have committed waste by digging away and removing the soil of the lands, and converting the same into bricks for sale, and by selling such bricks to be used off the premises comprised in the leases and grants.

Solicitors for the plaintiffs : *Torrens, Sons, & Bristow.*

Solicitors for the defendants : *Hugh Wallace & Co.*

D. M'C. M.

Ross, J.
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Feb. 15.
March 26.

Appeal.
May 4.

IN THE MATTER OF THE ESTATE OF JOHN PIERCE
EVANS, OWNER; SUSAN FERGUSON, PETITIONER.

Mortgage—Tenant for life and remainderman—Demise for term of years and grant in fee—Clause preserving powers of tenant for life—Construction of deed—Power, whether released.

A settlement executed on the settlor's first marriage, under which he was tenant for life, with remainder to his eldest son in fee, gave power to the settlor to create a jointure for any after-taken wife. He joined with his eldest son in mortgaging the settled lands for an advance to the son. The mortgage deed contained two separate witnessing parts. First, a demise for 500 years to a trustee for the lender; secondly, a grant of the lands in fee to the lender. The second testatum was followed by a clause reserving to the father "all the respective powers reserved to him by the settlement," and it was provided that neither principal nor interest should be called in during his lifetime, and that neither his real nor personal estate should be held answerable for the moneys secured. The settlor afterwards married a second time, and exercised the jointuring power:—

Held, after the settlor's death, that the jointure so created in favour of the second wife took priority over the mortgage.

MOTION on behalf of the petitioner that the report of the Examiner dated 18th January, 1897, under an order of reference dated 28th July, 1896, to inquire into and report upon the priorities of the several charges and annuities affecting the estate, might be varied in so far as it found that the jointure of £300 a-year payable to Mrs. Elizabeth D'Arcy Evans, No. 2 in the schedule to the report, was a prior charge to the petitioner's mortgage No. 3 in the said schedule, and that it might be declared that the petitioner's mortgage was prior to the jointure. The facts and material portions of the documents on which the question of priority arose are stated fully in the judgment of Mr. Justice Ross.

O'Connor, Q.C. (with him, Sheil), on behalf of the petitioner, cited *Drew v. Lord Norbury* (1).

G. W. Walker, for Mrs. Evans, the jointress.

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It would be inconsistent with the reservation of the powers conferred by the settlement on the tenant for life to hold that the termor is able to destroy them. The whole frame of the mortgage deed shows that the position of Thomas D'Arcy Evans was to remain unaltered, notwithstanding his joining in the mortgage. The jointuring power was not to take effect until after the determination of the life estate, and it is not destroyed or extinguished by a conveyance of the life estate, unless, perhaps, by way of resettlement: *Watson's Equity*, pp. 851-854; *Saville v. Blacket* (1).

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Sheil, in reply :—

There would have been no object in making Thomas D'Arcy Evans a party to the mortgage if the contention of the jointress is to prevail. The capitalized principal and interest is charged by both grantors on the premises—that must include the term of years. The tenant for life and remainderman carve out of the fee a term of years, which would have a consistent and reasonable effect if our view is accepted; and yet it is said that the Court is to read into the deed an intention on the part of Thomas D'Arcy Evans to part with nothing whatever: *Hurst v. Hurst* (2).

Ross, J. :—

March 26.

This is an application on behalf of the petitioner to vary the Examiner's report by placing her mortgage which stands No. 3 on the schedule, above Mrs. Elizabeth D'Arcy Evans' jointure of £300 a-year, which stands No. 2 on the schedule.

The facts are as follows :—A settlement dated 15th May, 1835, executed on the marriage of Thomas D'Arcy Evans with his first wife, contains a clause to the effect that it might be lawful for him to settle a jointure on any woman he might marry after her decease. He survived his first wife, and on the occasion of his second marriage in 1875, purporting to exercise the power, he granted to his second wife, Mrs. Elizabeth D'Arcy Evans, from and after his decease, a jointure of £300 a-year. In the mean-

(1) 1 P. W. 777.

(2) 16 Eav. 372.

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time, however, he was party to a deed dated 14th May, 1865, whereby the lands were mortgaged to David Ferguson. This security is now vested in the petitioner.

Between this mortgage and the jointure a question of priority arises.

The power to create the jointure is not imperative; it is not of the nature of a trust; it is purely optional. Any dealing with the estate inconsistent with its exercise may determine the power or may limit or postpone the interest created under it.

To join in a mortgage *prima facie* would have the effect of postponing the charge to be created under the power, on the principle that a man is not allowed to defeat his own grant. If there were no express reservation of the power in the mortgage deed itself, I should so decide in this case. But the deed contains a reservation to Thomas D'Arcy Evans of all the power reserved to him by the settlement. Whether this reservation has the effect contended for depends upon the construction of the deed. If the power is released in favour of the mortgage it is by implication, not by express words. The deed as a whole—its scope and object must be considered.

The parties to the mortgage deed are four:—

1. Eyre George Elyston Evans, the son.
2. Thomas D'Arcy Evans, the father.
3. David Ferguson, the mortgagee.
4. Edmund Walshe, a trustee for David Ferguson.

It is recited in the deed that the son is in want of £220 which the father had consented to aid him in securing. The deed then contains a covenant on the part of both father and son to pay the amount lent with interest, and for the purpose of securing the principal sum, interest and compound interest, both join in demising the lands to Walshe for a term of 500 years upon the trusts thereafter mentioned. They then proceed to grant the lands jointly to the mortgagee Ferguson, with the usual estate clause, reserving to the father his then existing rights in respect of timber and other privileges. The deed then proceeds as follows:—
“It being the express intent and meaning of these presents, and the agreement of the parties hereto that the life estate of the said Thomas D'Arcy Evans in the said lands, and all rights and pri-

vileges appurtenant thereto, shall not in any way be interfered with, and that he shall continue in the undisturbed enjoyment thereof in as full and ample manner as hitherto during the full space and term of his natural life, and reserving also unto the said Thomas D'Arey Evans all the respective powers reserved to him in and by a certain indenture of settlement bearing date 15th May, 1835, in as full and ample a manner as contained in and given by the said indenture of settlement." Later follows a proviso that during the lifetime of Thomas D'Arey Evans the principal or interest should not be called in or enforced. It is provided that the interest and compound interest should be added to the principal as in the nature of a further advance, and that the capitalised interest should be chargeable on the premises. It is further provided that the real and personal estate of the father should not be made answerable for any of the money secured.

His estate and interest—all his powers including his power of creating a jointure under the settlement—are protected in the most careful way.

It is contended on behalf of the petitioner that all this elaborate protection of the father's interest and reservation of his powers must be read only in connection with the grant of the fee by way of mortgage; and that in being a party to the demise for the term of 500 years he left himself without any protection whatever, that the term is carved out of the property conveyed, and that this part of the deed is to be read by itself.

I am unable to explain why the term of years is introduced, or why Walshe is a party to the deed, or why Thomas D'Arey Evans joined in it at all. The long term of years is quite as valuable a security as the fee-simple. The Conveyancing Act of 1881 recognises its value by rendering such a term capable of enlargement into a fee-simple.

I am wholly unable to hold that the effect of the introduction of this term and a trustee is to render useless the express reservation of the powers in the settlement. I cannot strike out the words "the express intent and meaning of these presents," and "the agreement of the parties hereto." They govern the whole deed. Why should they be introduced in connection with the mortgage of the fee and not in connection with the term, to all in-

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Ross, J. tents and purposes as good as the fee? These words with the
1897. words that follow amount to a declaration that Thomas D'Arcy
In re Evans' powers under the settlement were not to be subordinated
EVANS' to the mortgage, and that this was part of the agreement between
ESTATE. all the parties.

In the view I take, it is unnecessary for me to express an opinion on the argument of Mr. Walker, that in grants of a life estate there is a difference when the power only comes into operation on the termination of the life estate, and when it becomes effective during the existence of the life estate.

I therefore confirm the report, and refuse the application with costs.

W. G.

Appeal.
May 4.

The petitioner appealed to the Court of Appeal.

O'Connor, Q.C., and *Sheil*, for the appellant.

Gordon, Q.C., and *G. W. Walker*, for the respondent, were not called on.

THE COURT OF APPEAL (*Fitz Gibbon, Barry, and Walker, L.JJ.*) affirmed the decision of *Ross, J.*, and dismissed the appeal with costs.

Solicitors for the petitioner: *D'Alton & Co.*

Solicitor for Mrs. Evans: *W. M. Beauchamp.*

G. Y. D.

IN THE MATTER OF THE ESTATE OF THE TRUSTEES OF *Ross, J.*
W. STANNARD. 1897.

March 17, 31.

*Solicitor and client—Retaining lien—Tenant for life and remainderman—
Lunatic—Committee.*

A, who was a lunatic, so found by inquisition, was tenant for life of certain lands, with remainder to B and to C, as tenants in common in tail. H was employed by the Committee as solicitor in the lunacy matter, and in that capacity obtained custody of the title-deeds. B was subsequently appointed Committee, and continued H as solicitor. In order to pay off a mortgage on the life estate B and C were desirous of creating a charge on the fee, and for that purpose they presented a petition in the lunacy matter, that the Committee might be authorized to join in barring the entail. H acted as solicitor in connexion with the petition, the raising of the loan, and the disentailment of the estate.

Held, after the death of the lunatic, that H was entitled to a lien on the deeds for these costs against B and C, but was not entitled to a lien against them for any other costs incurred as solicitor for the Committee, save as regarded the taking out of a fee-farm grant, which was not disputed.

MOTION raising the question whether to any and what extent Messrs. Hamilton and Craig, solicitors, were entitled to a lien for costs on the title-deeds of the lands sold in this matter.

The facts sufficiently appear from the judgment of Mr. Justice Ross.

O'Connor, Q.C., for the assignees in bankruptcy of William Stannard:—

Messrs. Hamilton & Craig obtained possession of the title-deeds from the tenant for life only, and their lien ceased with the life estate.

The Committee, no doubt, may be personally liable. But there is no lien on his estate in remainder: Cordery on Solicitors (2nd Ed.), p. 293; *Ex parte Fuller*; *In re Long* (1). *In re Nicholson*; *Ex parte Quinn* (2) is confirmatory of *Ex parte*

(1) 16 Ch. D. 617.

(2) 53 L. J. (N. S.) Ch. 302.

Ross, J. *Fuller* (1), but possibly carries the principle to an extreme length.
 1897. It certainly does not seem reconcilable with the earlier decision
In re of the same learned Judge: Bacon, C. J., in *In re Messenger*; *Ex*
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F. A. P. Hamilton, for Henry Stannard, cited *Ex parte Nesbitt* (3), *Lightfoot v. Keane* (4), *Hoare v. Parker* (5), *Barnesley v. Powell* (6).

Matheson, Q.C., and *S. L. Brown*, for Messrs. Hamilton and Craig:—

The right to lien does not altogether depend on the *status* of the party from whom it is derived. Though created by a tenant for life it will bind a remainderman who allows the deeds to continue in the custody of the solicitor. Possession and not deposit is the test: *Henry on Solicitors' Remuneration*, p. 96; *Ex parte Pemberton* (7), *Ex parte Sterling* (8). In *Ex parte Fuller*; *In re Long* (1) it is clear that the solicitors were not solicitors for the mortgagees in the transaction. If the mortgagees had been the clients, the costs would have been mortgagees' costs and would have been added to the demand: *Re Broomhead* (9), *Blunden v. Desart* (10), *Stevenson v. Blakelock* (11).

O'Connor, Q.C., in reply referred to *Stokes on Solicitors' Lien*, p. 58.

March 31.

Ross, J.:—

This is an application on behalf of Henry Stannard and the assignees in bankruptcy of William Stannard for a declaration that Messrs. Hamilton and Craig are not entitled to a lien for costs upon any documents of title lodged by them in this matter. Counsel for the applicant do not deny that both William Stannard and Henry Stannard were personally liable for these costs, but

(1) 16 Ch. D. 617.

(2) 3 Ch. D. 317.

(3) 2 Sch. & Lef. 279.

(4) 1 M. & W. 745.

(5) 2 T. R. 376.

(6) 1 Amb. 102.

(7) 18 Ves. 282.

(8) 16 Ves. 258.

(9) 5 Dowl. & L. 52.

(10) 2 Dr. & War. 423.

(11) 1 M. & S. 535.

they contend that personal liability is one thing and that a lien upon deeds is another.

The facts are shortly as follows:—

The Rev. Henry Stannard, the father of Henry and William Stannard, became a lunatic. He was entitled to an estate for life in the lands ordered to be sold, with remainder to his two sons as tenants in tail in common in equal shares.

Robert Roger Stannard, a brother of the lunatic, was originally the Committee. The solicitor acting for him in the lunacy matter was Mr. W. H. Brownrigg. Mr. Brownrigg died in 1882, and he was succeeded by Messrs. Hamilton and Craig, as solicitors for Robert Roger Stannard. On the 21st of February, 1889, Henry Stannard became the Committee of the lunatic, and Messrs. Hamilton and Craig continued to act as his solicitors up to the lunatic's death in 1890.

There was a mortgage on the lunatic's life estate bearing high interest, and it appeared desirable that money should be raised to pay off this charge through the Civil Service Building Society. This could only be done by creating a charge on the fee. A petition was presented by William and Henry Stannard, that the Committee of the lunatic might be authorized to join in barring the entail for the purpose of creating a charge on the fee.

It appears that ultimately this arrangement was carried out. In these matters Messrs. Hamilton and Craig acted as solicitors for William and Henry Stannard, and it is in relation to these matters that the costs have been incurred by them jointly. Messrs. Hamilton and Craig had previously taken out a fee-farm grant of some part of the lands, and the lien to that extent, amounting to £15 10s., is not disputed.

The next question arises as to the costs incurred by Henry Stannard as Committee of the lunatic. The tenant for life is entitled to the custody of the title-deeds. It is clear that Messrs. Hamilton and Craig obtained possession of the title-deeds as solicitors for the Committee of the tenant for life. As a tenant for life can only create a lien co-extensive with his estate, it is plain that any lien for costs incurred by the Committee could only affect the life estate (*Ex parte Nesbitt* (1), *Lightfoot v. Keane* (2)),

(1) 2 Sch. & Lef. 279.

(2) 1 M. & W. 745.

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although Henry Stannard, the Committee, was personally liable. The retention of the deeds would affect the other remainderman, William Stannard, who, so far as the evidence goes, had nothing to do with Messrs. Hamilton and Craig till the time when they were instructed to present the petition in the lunacy matter by his brother Henry and himself. Therefore in respect of all costs incurred by Henry Stannard, acting as Committee of the lunatic, I hold that there can be no lien affecting more than the life estate, and I so declare.

A more difficult question arises in relation to the costs incurred from and after the time when William Stannard and Henry Stannard join with the lunatic in barring the entail and mortgaging the fee. I can hardly say that the decisions on the subject of solicitors' lien are quite reconcilable, but the principles are sufficiently settled to enable me to arrive at a satisfactory conclusion. The doctrine is not a very ancient one. It depends upon an implied contract which is inferred from a usage. In accordance with this usage it affects all the client's documents that come into the solicitor's hands in regular course of business. Depending upon implied agreement, a lien may be the subject of contract expressed or implied. Moreover, whoever has a title to the land has a right to all the deeds affecting it: *Smith v. Chichester* (1). If the client at the time of the deposit is not entitled to their possession, the solicitor's lien is not good as against the rightful owner. Keeping in view these principles I briefly approach the consideration of the chief cases relied on in the argument.

In *Ex parte Fuller* (2) the title-deeds were deposited with their solicitors by the mortgagees for safe custody. Afterwards the mortgagor employed the same solicitors to sell the property, which they ineffectually attempted to do, making use of the deeds which happened to be in their custody. The solicitors attempted to set up a lien as against the mortgagor. This was held impossible, for the plain reason that neither the mortgagor nor the solicitors had rightful possession of the deeds. All through the possession was solely the possession of the mortgagees.

In *Ex parte Calvert* (3) a solicitor was instructed by the mortgagor to prepare a mortgage. The title deeds were deposited

(1) 2 Dr. & W. 393. (2) 16 Ch. D. 617. (3) 3 Ch. D. 317.

with him for the purpose. He also acted for the mortgagee, and still retained possession of the deeds. Here it was held that the solicitor had a lien against the mortgagor, because he had a lien to begin with, which was not lost unless there was an agreement to the contrary. The mere fact that the solicitor acted for the mortgagee is not a circumstance from which an agreement to give up his lien should be inferred. This last proposition is not borne out by the case of *In re Nicholson* (1); but I agree with *Ex parte Calvert* (2).

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In the present case the deeds were originally in the possession of the solicitors as representing the tenant for life, and so remained down to the time of the transaction with the Civil Service Building Society. That transaction changed the character of the custody. The deeds were used for the purpose with the consent of all parties, mainly in the interest of the tenant for life. Were the deeds in the hands of the solicitor for both tenant for life and remaindermen, merely as representing the tenant for life? I think not. The tenant for life and remaindermen had power to create a charge on the fee. The deeds were in the custody of their common solicitor for this purpose. They had power together to create a lien on the deeds. Messrs. Hamilton and Craig were acting as solicitors for them all, and in that capacity they must be taken to have held the deeds. The deeds never afterwards left their custody till they were deposited here. I hold that what occurred is the same thing as if tenant for life and remainderman had walked into a solicitor's office with the deeds, and instructed him to prepare a mortgage on the fee. Could the remainderman, on the death of the tenant for life, insist on receiving the deeds without paying the costs for which he was personally liable?

Therefore, in respect of all the costs included in the second bill, I declare that the solicitors have established their lien. As each party has partly succeeded and partly failed, there will be no rule as to costs of this motion.

Solicitors for the assignees of Wm. Stannard : *Larkin & Co.*

Solicitor for Henry Stannard : *Louis J. Watters.*

Hamilton & Craig, solicitors in person.

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March 4, 11,
30.

DUNGARVAN GUARDIANS v. MANSFIELD.

(1896. No. 704.)

Public well—Well on private property—Vesting in sanitary authority—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 74.

In an action by a Sanitary Authority, claiming that a well situate on private property was vested in them under section 74 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), the Court was satisfied on the evidence that the well was freely used, without hindrance or interruption, as far back as living memory went; that it was so used principally by the inhabitants of some neighbouring houses, but that such user was not confined to such inhabitants, but was free to all persons who had occasion to resort to the well, and that a path existed during all that time, affording access to the well from a public road.

Held, that a right in the public to enter and take water from the well could not be supported by prescription, that it was too wide to be the subject of a custom, and that it could only arise from a dedication to the public by the owners from time immemorial of the land on which the well existed.

But, *held*, that it was not necessary for the plaintiffs to establish such dedication, for if they could show that, at the time of the passing of the Act, the well was an existing public well, used for the gratuitous supply of water to the inhabitants of the district, it became by the said section vested in the plaintiffs. That to show that the well was then a public well the plaintiffs need not prove that the soil and freehold of the well itself was public property, for if the public had a servitude attached to the soil and freehold, by virtue of which they enjoyed the right of free access to the well to obtain its water for their use, it would be a public well within the meaning of the Act.

Smith v. Archibald (5 App. Cas. 489) applied, and the well *held* to be a public well within the Act.

ACTION by the Guardians of the Poor of the Dungarvan Union for:—1, an injunction to restrain the defendant, his agents, servants, and workmen from erecting or maintaining any wall around a certain well, or otherwise appropriating or interfering with said well; 2, an injunction directing the defendant to forthwith take down and remove a wall which he had built around said well, and to restore said well to the state or condition it was in prior to the acts complained of.

The statement of claim alleged :—The area of the Poor Law Union of Dungarvan is a Rural Sanitary District, and the plaintiffs, as the Guardians of the Poor of said Union, are the Sanitary Authority of said District. Near or adjoining to the public road in the village of Crobally, within said District there existed at the date of the passing of the Public Health (Ireland) Act, 1878, (41 & 42 Vict. c. 52), and still exists a public well used for the gratuitous supply of water to the inhabitants of said District. Under and by virtue of the provisions in that behalf contained in the said Act, the said well became, at the date of the passing thereof, and is now, vested in and under the control of the plaintiffs as such Sanitary Authority as aforesaid. The defendant has built a high wall around said well, and has kept the gate leading thereto locked, and has excluded the plaintiffs and all persons from having access to said well. The plaintiffs, as such Sanitary Authority, have required the defendant to take down and remove said wall, and to restore the well to the state or condition it was in prior to the acts complained of, but the defendant has refused, and still refuses to do so.

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The defence (amongst other matters) denied that the well was a public well, alleged that it was never used by the inhabitants of the said District as a public well, and denied that it was used for the gratuitous supply of water to the said inhabitants, as alleged. It also alleged that the well and the lands on which the same was situate were the exclusive property of the defendant, and that no public right of access to said well or right of public user of the water thereof existed.

The facts of the case and the result of the evidence are stated in the judgment of the Vice-Chancellor.

Matheson, Q. C., and *O'Connor, Q. C.* (with them *Molony*), for the plaintiffs, referred to sect. 74 of the Public Health (Ireland) Act, 1878 (1), and to *Smith v. Archibald* (2), and *Mann v. Brodie* (3).

(1) Sect. 74 :—“All existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants of the district of any sanitary authority shall vest in and be under

V.-C. *Ronan, Q.C., and Charles E. Mac Dermot*, for the defendant,
 1897. contended that section 74 applied only where a public *right* had
 DUNGARVAN been acquired to take the water of a well, and that the public
 GUARDIANS in general could not acquire such a right as was alleged in the
v. present case either by custom or prescription. They referred to
 MANSFIELD. *Race v. Ward* (1), *Fitch v. Rawling* (2), *Goodday v. Michell* (3),
 Parker v. Combleford (4), *Mayor, &c., of London v. Cox* (5),
 Hammerton v. Honey (6), *Bourke v. Davis* (7), *Smith v. Andrews* (8),
 Edwards v. Jenkins (9), *Goddard on Easements* (3rd ed.), p. 8.

March 30.

THE VICE-CHANCELLOR :—

This action has been brought by the Dungarvan Poor Law Guardians, as the Sanitary Authority of the District, for an injunction to restrain the defendant from erecting or maintaining a wall round a well on the defendant's land or otherwise appropriating or interfering with said well, and to remove a wall built by him round said well, and to restore the well to its condition prior to the acts complained of. The plaintiffs claim title to this well as such Sanitary Authority, under the 74th section of the Public Health (Ireland) Act, 1878, which enacts that all existing public cisterns, pumps, *wells*, &c., used for the gratuitous supply of water to the inhabitants of the district of any sanitary authority shall vest in and be under the control of such authority, and such authority may cause the same to be maintained and plentifully supplied with pure and wholesome water. The well in question is situate on the defendant's land, at a short distance

the control of such authority, and such authority may cause the same to be maintained and plentifully supplied with pure and wholesome water, or may substitute, maintain, and plentifully supply with pure and wholesome water other such works equally convenient; they may also (subject to the provisions of this Act) construct any other such works for supplying water for the gratuitous use of any inhabitants who choose to carry the same away, not for sale, but for their own private use."

(1) 4 E. & B. 702.

(2) 2 H. Bl. 393.

(3) Cro. Eliz. 441.

(4) *Ibid.* 725.

(5) L. R. 2 H. L. 239.

(6) 24 W. R. 603.

(7) 44 Ch. D. 110.

(8) [1891] 2 Ch. 678.

(9) [1896] 1 Ch. 308.

from the public road, on a small piece of rocky ground, which until recently was unenclosed and almost a waste. Down to the time of the famine in 1849 there was a village of about fifty cottages close to this piece of ground, inhabited by a number of families by all of whom this well appears to have been freely used. Most of these families have disappeared, and most of the cottages have gone to ruin or have been pulled down, but there are still several remaining and inhabited. The defendant a few years ago partly enclosed the piece of ground with a wall, but there was still an open passage from the public road down to the well. About two years ago the defendant built another wall, which completed the enclosure and shut out the neighbouring residents and the public generally from access to the well. The people living in the neighbourhood then complained to the Sanitary Authority to exercise its powers and obtain a restoration of free access to the well, and it required the defendant to take down the wall and restore the well to its former condition. This he refused to do, and he in his defence to this action denies that the well was or is a public well, and alleges that it never was used by the inhabitants of the district as a public well, and denies that it was ever used for the gratuitous supply of water to the said inhabitants. He also alleges that the well and the lands on which the same is situated were the exclusive property of the defendant, and that no public right of access to the well, or right of public user of the water of the well, has existed or does exist, as alleged by the plaintiffs. On these defences issue was joined.

A large number of witnesses for the plaintiffs were examined who remember the well and the locality for a long period, some of them for sixty or seventy years, and others for shorter periods, on whose evidence I am satisfied that the well, though situate on private property, was freely used without hindrance or interruption as far back as living memory goes; that it was so used principally by the inhabitants of the neighbouring houses, who obtained from it all or nearly all their drinking water, and also water for other purposes, and that this user was not confined to such inhabitants, but was free to all persons who had occasion to resort to the well. I am also satisfied that a path existed during all that time, affording access to the well from the public road.

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This right could not be supported by prescription, and is too wide to be the subject of a custom, as it appears not to have been confined to the inhabitants of the neighbourhood, or of a parish, or of any legally defined district. It must, therefore, have arisen from a dedication to the public by the owners from time immemorial of the land on which the well exists. But it is not necessary, in my opinion, for the plaintiffs to establish such dedication, for if they can show that at the time of the passing of the Public Health (Ireland) Act, 1878, it was an existing public well, used for the gratuitous supply of water to the inhabitants of the District it became, by the 74th section of that Act, vested in and under the control of the plaintiffs as the Sanitary Authority, who were given power to cause the same to be maintained and plentifully supplied with water. The question of course arises whether this was then a public well. For this purpose the plaintiffs need not prove that the soil and freehold of the well itself was in any sense public property; for if the public had a servitude attached to the soil and freehold, by virtue of which the public enjoyed the right of free access to the well to obtain its water for their use, it would be a public well within the meaning of the Act. The case of *Smith v. Archibald* (1) is an important authority upon this question. It was a decision on the Scotch Public Health Act, which in its corresponding section is not nearly so strong an enactment as the 74th section of the Irish Act, for it does not vest public wells in the Sanitary Authority, but only enacts that the Sanitary Authority may cause all existing public wells, &c., used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water. The question there arose as to a well situated on private ground, the water of which had been used for domestic purposes gratuitously by the inhabitants in the vicinity for the Scotch prescriptive period, and it was held by the House of Lords that it was a public well within the meaning of the section, and that the Sanitary Authority had power to enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. Evidence was given

(1) 5 App. Cas. 489.

there, as here, of user by the inhabitants, and that some repairs and improvements had been made by the inhabitants from time to time, and it did not appear that the proprietor of the lands had ever interfered with the well or performed any act of proprietorship. Here it was proved that between the years 1826 and 1830 the neighbouring farmers had joined in making a dyke to carry off the overflow, and that they by their servants cleaned the dyke. Lord Hatherley, in his judgment, speaking of the well, says:—"a 'public well,' I must call it, for it had been supplying that portion of the public which resides in *Denny*" parish. Lord O'Hagan says:—"What is a 'public well'? I think it is a well that is used by the public." He then observed that the statute had put upon the words "public well" a construction of its own, for it went on to say, "used for the gratuitous supply of water to the inhabitants," and asked:—"What is the meaning of a public well except a well that is used by the public, and used gratuitously by the public?" Lord Blackburn agreed in holding that the well was a public well; and the decision of the House was given accordingly. I cannot find any material difference between the facts in that case and the present, and it follows that the well in this case also is a public well, and is within the 74th section of the Irish Act. It is therefore unnecessary to consider whether the soil and freehold of the well itself passed to the plaintiffs, or whether it was only all the rights previously enjoyed by the public at large, or the inhabitants of the district in particular, that so passed. In either case the right, whatever it was, passed to them, and they have been wrongfully interrupted in the exercise of that right by the defendant.

An injunction, therefore, must be awarded which will be substantially in the terms asked for, but it must be confined to acts of interruption. It would be unnecessary and beyond the right of the plaintiffs to restrain the defendant from erecting or maintaining any wall around the well; for if he leaves a convenient access to the well through an opening in his wall it would give the plaintiffs all that they are entitled to. In like manner the second paragraph of the prayer is too wide, for it asks that the defendant should be directed to take down the wall which he has built.

It will be quite sufficient to grant an injunction to restrain

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the defendant from preventing or in any wise interfering with the free access of the well from the public road of all persons requiring same for the purpose of taking water therefrom for their reasonable personal or domestic use, and to enjoin him to remove so much of the wall erected by him enclosing the ground on which the well is situated as interferes with such free access thereto, and to maintain a path to the well through his land from some convenient part of the said public road for such free access.

The defendant must pay the costs of the action.

Solicitor for the plaintiffs: *J. F. Williams.*

Solicitor for the defendant: *Edward Burke.*

D. M'C. M.

Ross, J. IN THE MATTER OF THE ESTATE OF WILLIAM HENRY
1897. HARKNESS, OWNER; COX & CO., PETITIONERS.
April 21, 26.
May 7.
June 14. *Land Law (Ireland) Act, 1896, s. 40—Report of Land Commission—Inadequacy of price suggested—Jurisdiction of Land Judge.*

In determining, on the report of the Land Commission, the price at which holdings are to be offered to tenants, under section 40 of the Land Law (Ireland) Act, 1896, the Land Judge will not adopt as adequate sums which a cautious valuator for an intending mortgagee would consider sufficiently secured.

Where the Land Judge considers the suggested prices inadequate he will direct the holdings to be offered to the tenants at increased prices fixed by himself, and if these offers be accepted by the tenants the Land Commission are bound to advance the whole of the purchase-money so fixed, less only the amount (if any) which the tenants are directed to pay in cash.

If there are arrears of rent which the Judge requires to be paid by the tenants as a condition of the purchase, the amount of such arrears (to be paid in cash by the tenants) will be added to the purchase-money to be advanced by the Land Commission, and the offer will be made at that aggregate price.

Evidence as to value may be given on the consideration of the report.

CONSIDERATION of report of the Irish Land Commission, made in pursuance of section 40 of the Land Law (Ireland) Act, 1896, at the request of the Land Judge, dated the 21st of November, 1896.

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The report stated that the estate had been inspected by an Assistant Commissioner during the month of February, 1897. The estate adjoined, and Lot 3 formed part of, the village of Ardagh, in the county of Limerick, where there is a railway station, and was situate about three miles from the town of New-castle West. The larger holdings were used as mixed tillage and grazing farms, the crops being principally potatoes and oats. The road accommodation and water supply were sufficient. With two exceptions, the tenants appeared to be fairly comfortable, and the buildings were fairly maintained. The poor rates were 1s. 10d. in the £, and county cess, 2s. 11½d.

A schedule was annexed to the report, showing full particulars of each holding, and the advances which the Commission stated they considered would be adequately secured in the event of sales being carried out.

In the case of the portions of Lot 3 situate in the village of Ardagh, the Commission advised that, having regard to the character of these holdings, the purchase-moneys should be paid in cash.

The schedule (omitting these village holdings) was as follows :—

[SCHEDULE.

SCHEDULE REFERRED TO IN REPORT.

Denomina- tion as stated in Rental.	Name of person appearing in occupation as tenant at date of inspection.	Reference No. to Map on Rental.	Area Statute Measure.	Tenement Valuation.	Rent stated in Rental.	Price.	Advance which the Commission- ers consider would be adequately secured.	Part of price to be paid in cash (if any).	Guaran- tee deposit to be retained (if any).	Conditions.
LOT 1. Cross, Minister's Land,	Jonathan Bruce Massey, Denis Keegan, a sub- tenant; yearly rent, £4.	1 1	A. B. P. 45 1 16 2 2 18	£ s. d. 43 0 0 3 10 0	£ s. d. 61 6 4 — — —	£ 900 60	£ 900 60	— —	180 —	The rental should be amended by substituting Denis Kee- van, as direct tenant of the portion of the lands occupied by him under Mr. Massey. A like amendment should be made as regards John Tobin and John Mullins, who are ordinary yearly tenants under Mr. Massey, and are not in his employment.
	Jonathan Bruce Massey, John Tobin, a sub- tenant; yearly rent, £2.	1 (a) in 1	58 3 4 1 0 10	18 0 0 — — —	34 0 0 — — —	540 17	540 17	— —	108 4	
Commons,	John Mullins, a sub- tenant; yearly rent, £1 13s. 6d.	(b) in 1	1 3 36	— — —	— — —	17	17	—	4	
LOT 2. Commons,	Bridget Mullins, ..	2	27 3 11	20 0 0	28 10 0	375	375	—	75	
LOT 3. Reerastá North, Ardaugh,	James Ahern, ..	1	0 3 38	2 0 0	2 10 4	35	35	—	7	In this case a guarantee de- posit of £ would be required having regard to the cir- cumstances of the tenant. Ellen Ward, named in the rental, died in Oct., 1896. The name of her son Denis Ward, who is in occupation, should be inserted in the rental.
	Michael Harold, ..	1 to 1 (b)	17 0 17	14 15 0	17 0 0	320	320	—	64	
	Ebridget O'Brien, ..	2	23 2 27	23 10 0	22 0 0	390	390	—	130	
	William Cronin, ..	3 to 3 (b)	6 2 20½	8 10 0	8 13 10	125	125	—	25	
	Denis Ward, son of Ellen Ward. ..	4	4 1 7	6 5 0	9 14 0	80	80	—	16	
	Cornelius Brien, ..	6 to 6 (a)	4 0 14	6 0 0	6 0 0	100	100	—	34	In this case a guarantee de- posit of £ would be required having regard to the cir- cumstances of the tenant.
	Michael Enright, ..	7	1 0 10	3 0 0	2 17 0	35	35	—	7	

It appeared that the principal sum due on foot of the incumbrances was £3880 6s. 8d., and that in order to provide for the principal sum due on foot of the incumbrances prior to and including that of the petitioners, and the costs of sale, a sum of about £2800 would be required. The principal sum due on incumbrances, subsequent to that of the petitioners, was £1545 10s., including a mortgage for £1475 10s., dated the 10th of August, 1896, vested in the owner's mother. Interest on this mortgage had not been paid, but the owner had for some years received about £50 a-year out of the estate.

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An affidavit was made by the owner, in which he stated that in his opinion the prices suggested were not sufficient, and that eighteen years' purchase at least should be given. Lots 1 and 2 were held for statutory terms, at fair rents fixed in 1884.

It appeared from the receiver's account that besides the gale of rent due in March, 1897, which none of the tenants had paid, there were arrears to September, 1896, due by Michael Harold, Bridget O'Brien, and William Cronin.

C. R. W. Brady, for the petitioners, submitted the report to the Court, and stated the circumstances of the estate as to incumbrances, as above mentioned.

Twigg, Q. C., for the owner :—

On the face of the report the prices suggested by the Land Commission (if the proposed advances are to be taken as the prices) are manifestly inadequate. The Land Commission have the tenant's and the landlord's interest as security for the advances.

The basis of the report is wrong. The property has apparently been valued, not for a purchase, but as security for a loan with an ample margin. Under the Act of 1896 (59 & 60 Vict. c. 47, sect. 40 (1) (b) the offer is to be made at a fair value, having regard to the interests of everyone interested in the estate, tenants, incumbrancers and owner. This Court is neither bound by the figures reported by the Land Commission, nor authorized by the Act to adopt them if too low. [*Ross, J.*: You must remember that there is practically no outside market.] That is not contemplated by the Statute as an element in fixing the price. In con-

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sidering the report this Court is entitled to entertain evidence as to value offered by any of the parties interested. The owner ought to have an opportunity of inspecting the notes of the Assistant Commissioner entrusted with the inspection. The principle on which he made the valuation is vital. Obviously, the Commissioners (Mr. Commissioner Lynch and Mr. Commissioner Wrench) who signed the report now presented did not visit the property, and they merely followed the information given by the Assistant Commissioner, whose name was not even mentioned. [Ross, J., said that the original report of the Assistant Commissioner would be given to the Land Judge if required, but that the Land Commission regarded it as a private document, and the Court would not be justified without the assent of the Land Commission in giving it to the parties.]

After some further discussion the case was directed to stand over in order to enable the Land Judge to obtain, for his own information, the notes of the Assistant Commissioner who made the inspection. His Lordship also suggested that Mr. J. B. Massey should be invited to consider whether he would consent to his sub-tenants being placed in the position of immediate tenants to the owner of their holdings, with the view of enabling the sale of Lot 1 to be carried out under the Act. This course was assented to by *Mr. Kilbride*, solicitor for the sub-tenants on Lot 1, and *P. H. Law-Smith*, for Mr. Massey, agreed to communicate with his client in the interval.

April 26.

Ross, J., said that he had been furnished by the Land Commission with the notes of the Assistant Commissioner, who had inspected the estate. *Twigg, Q.C.*, submitted that copies of these notes should be given to the parties, who were entitled to know the principle on which the valuation was made. Ross, J., said that he was not at liberty to allow the parties to inspect or take copies of the notes.

Twigg, Q.C. The Land Judge has power to fix the price independently of the Land Commission, and the Land Commission is bound to advance the sums so fixed: See *In re Owen's Estate* (1)

per Lord Ashbourne, C., p. 206; Sir P. O'Brien, L.C.J., p. 211; Porter, M.R., p. 220; Palles, C.B., pp. 236, 241; Act of 1896, sect. 40 (1) (b). Sub-sect. (1) (d) could not possibly be applied unless the Land Commission were bound to advance the full sum which the Land Judge may deem necessary for the purchase. One of the leading elements for consideration is, What is the value of the purchase to the tenant? He does not pay the purchase-money out of his own pocket. The absence of outside competition ought not to depreciate a selling price which would otherwise be fair. Massey's purchase would yield $6\frac{1}{2}$ per cent. The presumption is that the rent fixed in 1884 was fair. The tenant has been paying it. When the amount of a rent is reduced the selling value of it is increased. But if in estimating price, regard should be had to the fall in value of agricultural produce in the interval, then the Court has a precedent in the Act of 1887, sect. 29, and the action of the Land Commission under that section. The average reductions under the section over all Ireland were, in 1887, 15 per cent., in 1888, 9 per cent., and in 1889, 4 per cent. The instalments are 4 per cent. on the purchase-money, so that Massey's gain would be a clear $2\frac{1}{2}$ per cent.

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P. H. Law-Smith, for the tenants, submitted that the report should be adopted in its integrity. The owner did not place a much higher value on the estate, and the purchasing tenants would have to pay all the taxes. [Counsel stated that Mr. Massey consented to the sub-tenants being treated as immediate tenants.]

Ross, J. :—

May 7.

In this case it is my duty to fix the price at which the estate is to be offered to the tenants. In addition to the Land Commissioners' report, and to the evidence before me in Court, by the courtesy of the Commissioners, I have examined their Inspector's report. In every case the amount suggested as the price of the holding is exactly the same as the amount of the advance which the Commissioners consider will be adequately secured. The Commissioners' report is, of course, of great importance, but is not conclusive as to price. It is made up without hearing either of the parties concerned, and is only intended to guide the Court in the

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difficult task of arriving at a just price and determining fair conditions under which the sale may take place. I have endeavoured to ascertain what is the value to the tenant of the fee-simple to be vested in him, and what is the value of the interest with which the landlord parts. Forming the best opinion I could, I found myself unable to approve of the valuation of the Inspector, and obliged to arrive at the conclusion that the prices suggested by the Commissioners are inadequate. The report seems to me to be such as one might expect from a very cautious valuator for an intending mortgagee, who takes care that even under the worst circumstances the money advanced should not be in any peril. Can I hold that a price fixed on the basis of this report is either reasonable or just? I think not, and I am, therefore, obliged to raise the prices. I have sent for the Receiver over the estate—a responsible person who has been connected with the property for the last seventeen years. I find that nearly all the tenants have been able to pay their rents punctually even before the rents were reduced by the Land Commission, and that at the present time they are in fairly good circumstances. Having gone carefully into the case of each tenant, I have not the slightest doubt that the tenants will have no difficulty in paying, instead of rent, the still further reduced annual sums in the form of the instalments to the Land Commission. The total purchase-money suggested by the Commissioners for so much of the property as I am now dealing with—the rental of which is £192 11s. 6d.—is £2994. This total I have raised to £3262—an increase of £268. The particulars are as follows:—Jonathan B. Massey, £900, raised to £1000; Denis Keevan, £60, remains £60; Jonathan B. Massey, £540, raised to £600; John Tobin £17, remains £17; John Mullins, £17, remains £17; Bridget Mullins, £375, raised to £412; James Ahern, £35, raised to £40; Michael Harold, £320, raised to £324; Bridget O'Brien, £390, raised to £400; William Cronin, £125, raised to £132; Denis Ward, £80, raised to £110; Cornelius Brien, £100, raised to £105; Michael Enright, £35, raised to £45.

These offers must be communicated to the tenants by the Land Commission. If they are accepted, I am of opinion that the increased sum must be advanced by the Land Commission.

Under certain circumstances, as, for instance, if I had any doubt about the security, I might order part of the price to be paid in cash. I have no doubt about it here. It follows that, in the words of the section, if the offer be accepted—"the sale shall be completed accordingly." The contrary construction has been suggested that, if the Land Judge raises the price the Land Commission can fall back on their former valuation, and refuse to advance the increase, or that if the Land Judge compels the unwilling fourth of the tenants, under the powers contained in section 40, sub-section (1) (*d*), to buy, the Land Commission may refuse these tenants the wherewithal to buy. Such a construction would make the whole section a sham, and is contrary to its spirit and its words. As regards the amount retained by way of guarantee deposit, I in no way interfere with the discretion of the Commission. Some time ago I took occasion to indicate that no land will be offered for sale under this section except at a fair and moderate price. I am glad to observe that, since I made this announcement, applications to take the estates out of Court have become less frequent, and many incumbrancers and owners have voluntarily consented to give the tenants the benefits of the immediate application of the section. I wish the tenants to understand that the offers, when once made, cannot be modified, and that no offer shall be subsequently made by this Court. If the offer is accepted in this case I shall not require the payment of the March rent, as there is a hanging gale custom prevalent on the estate. As regards the arrears due to September, 1896, Michael Harold must pay £11, Bridget O'Brien, £22, and William Cronin, £10 10s. The offer to each tenant is conditional on the acceptance by all. There are three tenants whose holdings are not within the terms of the section, and to whom no offer can be made.

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Brady stated that a query had been placed on the draft order as to the condition respecting the arrears of rent. Sub-section (1) (*b*) contemplated that the offer to sell should be made discharged from the arrears of rent due by the tenant. This seemed inconsistent with making the offer conditional on payment of arrears.

June 14.

Ross, J. *Ross, J.*, said that in the cases where arrears were to be paid,
1897. the arrears of rent as cash should be added to the Land Stock,
In re and the offer made at the aggregate amount. The following is
HARKNESS' the form of the order as ultimately settled :—
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“It is ordered by the Court that the fee-simple of the several holdings, the particulars whereof are set forth in the schedule hereunder written, shall be offered for sale to the respective persons named in the said schedule, as appearing to be in occupation as the tenants thereof, at the respective sums of Guaranteed Land Stock and cash in the schedule mentioned opposite to their names respectively, discharged from all arrears of rent then due in respect of such holdings, and discharged from all superior interests affecting the same, but subject as to such of the said holdings as are liable thereto to the rights and easements stated in the rental.”

The schedule to the order was the same as the schedule to the report of the Land Commission, with the necessary alterations in the amounts to be advanced, and with an additional column, headed, “Cash to be paid by tenants into Court to the credit of this matter,” in which, opposite the names of Harold, Bridget O'Brien, and Cronin, were the sums, £11, £22, £10 10s., respectively.

Solicitors for the Petitioners : *Baker & Ringwood.*

Solicitor for the Owner : *R. W. Peebles.*

Solicitor for Mr. Massey and other immediate tenants : *T. F. Cosgrave.*

Solicitor for under-tenants : *V. Kilbride.*

W. G.

IN RE MARCUS WARD & CO.

(1897. No. 243.)

V.-C.
1897.May 3.
June 8.

Company—Alteration of Memorandum of Association—Confirmation by Court—Practice—Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62).

Practice, forms of orders, &c., in proceedings for the confirmation of alterations in the memorandum of association of a registered company, under the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62).

PETITION by Marcus Ward and Company Limited, entitled in the matter, of the Company, and in the matter of the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), that a special resolution of the Company altering its Memorandum of Association might be confirmed by the Court under the said Act.

The petition was practically as follows:—

1. The Company was incorporated in the year 1883, under the Companies Acts, 1862 to 1880, as a company limited by shares.

2. The registered office of the Company is situated at the Royal Ulster Works, Belfast.

3. The objects for which the Company was established were by its Memorandum of Association stated to be as follows:—

(1.) The purchase from F. D. Ward and W. H. Ward of their estate and interest in the buildings known as the Royal Ulster Works, situate at Bankmore, Belfast, and in the premises 67, Chandos-street, Strand, and elsewhere in London, and in the premises No. 734, Broadway, New York, and also in the fixed and movable machinery, &c., and from the firm of Marcus Ward & Co. of the stock-in-trade and effects of the firm.

(2.) The carrying on of the business of wholesale stationers, lithographic printers, &c.

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- (3.) The lending of money, &c.
- (4.) The purchasing, hiring, or other acquisition of any estate or interest in any land, buildings, or other property necessary or convenient for the purposes of the Company, &c.
- (5.) The acquisition of any patent, &c.
- (6.) The acquisition by purchase or otherwise of the business or any part of the business carried on by any other Company, &c.
- (7.) The acquisition by purchase or otherwise, and the taking and holding of a share or shares in any other limited company or companies carrying on, or about to carry on, the business comprised in the above-mentioned objects of the Company, or the business and trade of any company carrying on in whole, or in part, business similar to that of the Company, and the subscribing of the Memorandum and Articles of Association of any company or companies formed or about to be formed for such objects or for the carrying on of such trade or business as aforesaid.
- (8.) The acquisition by purchase or otherwise of the property or rights of any person, or of any existing or future company, with power for any such purpose to make arrangements by way of amalgamation or otherwise with any existing or future company.
- (9.) The acquisition of any share or shares in the Company, &c.
- (10.) The sale, letting, or disposition of any property of the Company, either absolutely or at a rent or rents for any term or terms of lives or years or other partial estate or interest.
- (11.) The borrowing of money, &c.
- (12.) The doing of all such other matters and things as from time to time may appear conducive to the attainment of the objects of the Company, or any of them, or as are incidental to or convenient in the exercise of any of its powers.

4. The capital of the Company was originally £200,000, divided into 20,000 shares of £10 each.

5. Shortly after the incorporation of the Company it commenced and has since carried on business.

6. The Company issued 15,490 of its shares: £10 per share was paid up on same.

7. By a special resolution passed and confirmed in accordance with section 51 of the Companies Act, 1862, at extraordinary general meetings held on the 31st July and 29th August, 1891, it was resolved that the Articles of Association as revised, amended,

and then presented to the meeting, should be adopted as the Articles of Association of the Company.

8. Neither the Articles as originally framed nor the revised and amended Articles contained power to reduce the capital, but by special resolution duly passed and confirmed at extraordinary meetings held on the 5th and 21st June, 1894, it was resolved—1, that the Company might from time to time reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets; 2, that the Articles of Association of the Company should be altered by inserting therein the foregoing provisions.

9. By special resolution passed and confirmed on the 21st June and 6th July, 1894, it was resolved that the capital of the Company should be reduced to £120,000, divided into 20,000 shares of £6 each, and that such reduction should be effected by cancelling capital which had been lost, or was unrepresented by available assets to the extent of £4 per share upon each of the 15,490 shares issued, and by reducing the nominal amount of all the shares to £6 per share.

10. By order of the Vice-Chancellor, made on the 25th March, 1895, In the Matter of the Companies Acts 1867 and 1877, and In the Matter of Marcus Ward and Co., Limited and Reduced (1), the special resolution in the last paragraph mentioned was confirmed. The directions in the said order were duly complied with.

11. By special resolution, passed and confirmed on the 26th February and 13th March, 1897, it was resolved:—That the provisions of the Memorandum of Association of the Company, with respect to the objects of the Company, be altered as follows:—By inserting immediately after sub-clause 10 of clause 3, the following clauses: 10A. To sell or dispose of the undertaking of the Company, or any part thereof, for such consideration, and upon such terms and conditions, in all respects, as the Company may think fit, and in particular for shares, debentures, or securities of any other company having objects, altogether or in part, similar to those of this Company. 10 B. To promote, or join in promoting, any company or companies for the purpose of acquiring all or any of the property and liabilities of this Company, or for

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 WARD & Co. 12. The extension of the Company's objects, proposed to be effected by the said resolution, is to enable the Company to sell the New York Branch of the business, and to accept payment of the purchase price, chiefly in fully paid shares in a company to be formed for the purpose of purchasing the same, to be called "The Marcus Ward Company of New York." The assets, in New York, amount to about £13,300, and £10,000 of this will be paid for in shares, and balance in cash. The reasons which have led the Directors to come to the conclusion, that the sale of the business in New York would be very much in the interest of the Company, are, chiefly, that additional capital is required for the New York end of the business to fully equip it with the lines peculiar to American trade that are carried on by competing houses of equal standing, and that the additional capital could be had in the United States; the manager and sub-manager of the New York house having undertaken, if the transaction is carried through, that half the capital of the new company (which will be £20,000) will be taken and paid for in cash, either by themselves or their friends. The proposed alteration of the objects of the Company as aforesaid, is required to enable the Company to carry on its business more economically, and more profitably than heretofore, and to attain its main purpose by new or improved means, and also to enlarge the area of its connections. Under the arrangements proposed to be made with the New York Company, it will act as a feeder to the main business, and thereby extend the bulk of the Company's business and profits, while it will decrease the management expenses, and responsibilities.

13. The Company has a debenture debt of £30,000, which is secured as a floating charge on the whole undertaking of the Company. Such debenture debt is, both as regards principal and interest, amply secured. £12,500 of the said debentures are held by the Northern Banking Company (Limited), Belfast, as security for the Company's overdraft, amounting to about that sum, and £17,500 are held by Alex. Pirie & Sons (Limited), paper makers, Aberdeen, to secure advances to the Company to that extent.

14. Besides the said debenture debt, the Company is usually indebted to general creditors for goods supplied to the extent of about £25,000.

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15. The Company has sufficient working capital, and its assets are sufficient to pay all its debts, and to make good the whole of its paid up capital.

16. No one will be prejudiced by the proposed alteration in the Memorandum of Association of the Company, or by any extension or alteration of the Company's objects involved therein, and it is just and equitable that the said special resolution for the extension thereof should be confirmed.

An affidavit of F. D. Ward, since its formation a director, and down to June, 1895, Chairman of the Company, stated that he believed the statements in the petition were true; it made exhibits of a duplicate of the certificate of incorporation of the Company and of a printed copy of the Memorandum and Articles of Association at the date of the formation of the Company (1); it stated the special resolution of the 31st July and 29th August, 1891, and made an exhibit of a copy of the Memorandum and Articles so adopted (1). It stated the special resolutions of the 5th and 21st June, 1894, and 21st June and 6th July, 1894, and the Vice-Chancellor's order of the 25th March, 1895, and that the directions contained in said order were duly complied with, and made an exhibit of the certificate of registration of said order and of the minute referred to in same: stated the special resolution of the 26th February and 13th March, 1897, that the general meetings referred to in paragraphs 7, 8, 9 and 11, of the petition were convened by notices in the terms of documents exhibited, that these notices were duly sent out to the shareholders in accordance with the Articles of Association, and that the special resolutions were duly passed and confirmed in accordance with section 51 of the Companies Act, 1862; it made an exhibit of the minute book of the Company (1). The object the Company had in view in seeking for the sanction of the Court to the special resolution of the 26th February and 13th March, 1897, was to enable it

(1) See *In re Omnium Investment Co.*, [1895] 2 Ch. 127.

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WARD & Co. to sell the New York branch of the business to a company to be formed for the purpose of purchasing same, and to take £10,000 of the purchase-money in fully paid shares in the purchasing company and the balance in cash. The Company could not spare sufficient capital for the full development of the New York business, and this difficulty would be got over by the formation of a new company with the object of purchasing the Company's business and assets in New York, as the manager and sub-manager there had undertaken that they or their friends would take and pay for, in cash, half the share capital in the intended new company, which capital would amount to £20,000. The sale if carried out would increase the Company's business, and a portion of the American assets of the Company would be turned into cash, and the additional working capital that would be invested in the New York business would enable it to introduce many new lines which were much needed therein to bring it on a level with the other large stationery houses there. Another great advantage to the Company would be the getting rid of the expense and responsibility of the management thereof, while at the same time arrangements would be made by which the Company would have a preponderating influence in the New York company, and the goods required by it would be either purchased from the present Company or a per-centage paid to it, if purchased elsewhere. Deponent believed that the proposed arrangement would be most beneficial for the Company, and was calculated to place it on a firmer business basis and to largely increase its efficiency and earning capacity. The debenture holders, viz. the Northern Banking Company and Messrs. Pirie, had been consulted and entirely approved of the project, and a very large number of the shareholders had declared in favour of it. Deponent referred to a print of the balance sheet for the year ending 30th April, 1896, which he exhibited, and from which it would be seen that the assets of the Company were sufficient to pay all its debts, and to make good its paid up capital, and consequently no one would be prejudiced by the proposed extension of the Company's objects. If advertisements of the petition were inserted in two Dublin, two London, and two New York papers, in addition to the Dublin and London *Gazettes*, they would, deponent believed, reach all creditors of the

Company; he suggested their insertion in the *News-Letter* and *Northern Whig* in Belfast, the *Irish Times* and *Freeman's Journal*, in Dublin, the *Times* and *Daily Telegraph*, in London, and the *New York Herald*, and *New York World*, in New York.

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The petitioners, on the 22nd March, 1897, took out a summons for an order appointing a day for the hearing of the petition, and giving directions as to the publication of notices of the presentation of the petition, and of the day on which the same should be appointed to be heard; and, on the 23rd March, 1897, the Vice-Chancellor made an order that the petition should appear in the list for hearing on Monday, the 3rd May, and that an advertisement of the said petition should be inserted twice in each of the following newspapers, viz. the *Belfast News-Letter* and *Northern Whig*, published in Belfast; the *Irish Times* and *Freeman's Journal*, published in Dublin; the *Times* and *Daily Telegraph*, published in London; and the *New York Herald* and *New York World*, published in New York, and once each in the *Dublin* and *London Gazettes*, the second of such advertisements to be inserted not later than the 15th April. And that notice of the presentation of said petition should be sent to the debenture holders in said Company, such notice to be settled and approved at Chambers, and the said advertisements and notices to be confined to the proposed sale of the New York Branch of the said Company.

The notice to be sent by the petitioners' solicitor to the debenture holders, as settled at Chambers, was as follows:—(Title as in Petition). I beg leave to give you notice that a petition was presented to, &c. on the 15th day of March, 1897, for confirming a special resolution passed at a meeting of the shareholders, held on the 26th February, 1897, and confirmed at an extraordinary general meeting of said Company, held on the 13th March, 1897, viz. (Resolution in full). The foregoing resolution is in general terms, but at the hearing of the application it will be confined to taking powers for the Company to dispose of a part only of its undertaking, viz. the New York Branch.* I also beg leave to intimate that this notice is sent by direction of the Right Hon. the Vice-Chancellor of Ireland, for the purpose of ascertaining whether you, as a debenture holder or depositor, assent to, or dissent from, or

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are neutral with respect to the proposed alteration. As the Right Hon. the Vice-Chancellor desires to know whether you assent to, dissent from, or are neutral, I should be obliged by your writing "assent," "dissent," or "neutral," in the form sent herewith, and returning same to me on or before the 20th day of April, 1897. If you are desirous of opposing the making of the order for the alteration of the Memorandum of Association of the said Company under the above Act, you must appear at the time of hearing, viz. the 3rd day of May, 1897, by yourself, or by your counsel, for that purpose. A copy of the petition will be furnished you if you require same, by the undersigned, on payment of the regulated charges for same.

Accompanying the notice was a form to be returned, acknowledging receipt of the notice, and requesting that the person served should be returned as assenting (dissenting or neutral) in reference to the alteration.

The advertisement was in almost the same terms as the notice to debenture holders down to *: it continued:—and notice is further given that the said petition is directed to be heard before the Right Hon. the Vice-Chancellor of Ireland, on the 3rd May, 1897. Any creditor, shareholder, debenture holder, or depositor of the Company, desiring to oppose the making of an order altering the provisions of the Memorandum of Association of the said Company under the above Act, should appear at the time of the hearing by himself or by his counsel for that purpose. A copy of the petition will be furnished to any creditor, shareholder, debenture holder, or depositor of the Company requiring same, by the undersigned, on payment of the regulated charges for the same.

There was now an affidavit of service, by post, of the notice settled at Chambers, upon the Northern Banking Company (Limited), and Messrs. Alexander Pirie & Sons, and also on James Percy Chalmers and John M'Alister.

A further affidavit of Francis Davis Ward stated that he was informed by the Company's solicitor, that he received a formal intimation, in writing, from each of the above-named parties, assenting to the altering of the Memorandum, so as to enable the Company to sell its New York Branch. The said Bank and

Messrs. Pirie comprised all the debenture holders, and the said J. P. Chalmers and J. M'Alister all the depositors in the Company.

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No application had been made by any person for a copy of the petition. WARD & Co.

J. H. Moore, in support of the petition :—

The alteration sanctioned by the resolution was too wide, as it authorized the sale of the entire undertaking of the Company ; hence the order of the 23rd of March, 1897, directed the advertisements and notices to be confined to the sale of the New York Branch. The Court may confirm the alteration proposed, “either wholly or in part” (section 1 (5)). In some English cases the resolution has been varied or conditions have been imposed. See *In re Spiers & Pond, Ltd.*, (1). The present case comes under clauses (a) and (c) of sub-section 5. Some of the English cases direct notice of the order to be given to the Registrar of Joint Stock Companies, and that it be advertised.

There was no appearance for any other person.

THE VICE-CHANCELLOR pronounced an order, confirming the resolution as regards the sale of the New York branch.

The order as drawn up was not entered in time to enable the petitioners to deliver a copy thereof to the Registrar of Joint Stock Companies within fifteen days from the date of the order, as required by section 2 of the Act.

On the 8th June, 1897, *Moore* applied that the time for such delivery should be enlarged. He referred to *In re Reversionary Interest Society* (2).

June 8.

THE VICE-CHANCELLOR directed the time to be enlarged, and the original order was then drawn up as follows :—

“THIS Court doth order that the special resolution passed and confirmed at the extraordinary General Meetings of the above-named

(1) W. N., 1895, 135 (2). See also *In re Ulster Marine Insurance Co.*, 27 L. R. Ir. 487.

(2) W. N., 1892, p. 60.

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Company, held respectively, the 26th day of February, 1897, and the 13th day of March, 1897, and set forth in the schedule hereto, so far only as is necessary to enable the Company to sell a part of its undertaking, namely, its New York Branch, be confirmed pursuant to the Companies (Memorandum of Association) Act, 1890. And it is ordered that an office copy of this order be delivered to the Registrar of Joint Stock Companies, together with a printed copy of the Memorandum of Association as so altered, on or before the 15th day of June next ensuing. And it is ordered that notice of the registration of this Order be published as follows, that is to say:—Once in the *London Gazette*, once in the *Dublin Gazette*, once in the *Irish Times* and *Freeman's Journal* newspapers, published in Dublin, respectively; once in the *Belfast News-Letter* and *Northern Whig* newspapers, published in Belfast, respectively; once in the *Times* and *Daily Telegraph* newspapers, published in London respectively, and once in the *New York Herald* and *New York World* newspapers, published in New York, respectively; all such advertisements to be so published within one month from the date of the registration of this Order, as hereinbefore directed. And it is further ordered that the petitioners' costs of and incident to this petition, and order thereon be costs in this matter."

Schedule before referred to.

(Copy of the Special Resolution.)

Solicitor for the petitioners: *Buckley*.

D. M'C. M.

Ross, J. IN THE MATTER OF THE ESTATE OF CATHERINE DALY,
1897. OWNER: EX PARTE ANNE WILLENS, PETITIONER.
May 11, 17, IN THE MATTER OF THE ESTATE OF CHARLES VYSE,
18. OWNER AND PETITIONER.

Land Law (Ireland) Act, 1896, ss. 31, 40—Superior interest—Rent upon a rent—Redemption—Jurisdiction.

The Land Judge has power to put the 40th section of the Land Law (Ireland) Act, 1896, into operation with respect to a term of years of the requisite duration, or a sub-fee-farm grant, derived under a superior lease, or a fee-farm grant at a rent. The Court has power, under sect. 31, sub-sect. 4, to redeem such superior rent.

VYSE'S ESTATE.

Ross, J.
1897.

This was an application on the part of the owners (the assignees in bankruptcy of the original petitioner) for an order that a request should issue to the Land Commission under section 40 of the Land Law (Ireland) Act, 1896. The only question arose as to part of the estate called Carrowduff, containing 680 acres 14 perches, statute measure, held for a term of 500 years from the 12th August, 1821, derived under a lease for lives renewable for ever, dated the 9th December, 1687, at the yearly rent of £11 1s. 7d.

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Moriarty, in support of the application in Vyse's estate:—

The only question here is whether the fee can be vested in the tenants? Under section 31 (1), superior interests may be redeemed. The difficulty arises from the words "as defined by this section" coupled with the definition clause (8) providing that the expression "superior interest" shall include any reversion or estate expectant on the determination of the lease or expiration of the term under which the lands are held. But although this may restrict the power in sub-section (1) to the redemption of the rent incident to the immediate reversion, sub-sect. (4) confers on the Land Judges all the powers of the Land Commission with respect to the redemption of rents under the Acts of 1887, sub-sects. 15, 16, and 1891, sect. 20. The Land Commission have plainly power to redeem a rent payable out of a rent.

DALY'S ESTATE.

May 17.

This case came automatically before the Court upon notice to the solicitor having carriage pursuant to rule 5 of 23rd Jan., 1897.

An absolute order for sale was made on the 7th March, 1881, and a receiver appointed on the 9th November, 1881. The estate was insolvent. The lands were held under a sub-fee-farm grant dated the 30th September, 1742, from Agnes Southwell to Maurice Studdert at a rent equal to £102 3s. 8½d. British currency. This sub-fee-farm was derived out of a fee-farm grant dated 29th May, 1731, from Thomas Lord Southwell to Agnes Southwell at a rent of £55 3s. 6d. Irish currency.

C. R. W. Brady, for the petitioner, said that it was a case in

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which it would be for the interest of all parties that the request should issue. The only difficulty was whether the Court would have power to redeem the superior fee-farm rent of £55 3s. 6d. Irish, in other words, whether a rent upon a rent was a superior interest redeemable under section 31 of the Act of 1896, a question which had not hitherto been decided.

Ross, J. :—

In this case, and in several now pending before me, I must decide whether this Court has power to redeem a rent upon a rent under the powers conferred by the Act of 1896. I am of opinion that the Court has this power. In every case where the Land Judge has a fee-simple to vest in the tenant, and the other conditions of sect. 40 apply, the Judge is required to make an offer to the tenant to sell him the fee-simple of his holding: subsection (1) (b).

Under section 31 where land is sold to the tenant, and an advance is made for the purpose of such sale, the sale shall be made discharged from all superior interests as defined by the section, or from any of them; and in every such case the land shall be vested in the purchaser in fee-simple, and such superior interests or the value thereof shall become a lien upon and be redeemed or satisfied out of the purchase-money. I have already decided that the only intelligible meaning to put upon the words "or from any of them" is to hold that the Court is at liberty to vest the fee-simple subject to some of the superior interests: *In re Grogan's Estate* (1). It has been contended that the Court has not power to redeem all superior interests, but only all superior interests as defined by the section.

This brings me to sect. 31, sub-s. 8, which creates the difficulty. The earlier words in the section are wide enough to cover the case of a rent upon a rent, the latter words seem to me conversant only with the case of an immediate superior interest.

Turning to sub-sect. 4 of the same section we find that the Land Judge has the power of apportionment and redemption conferred on the Land Commission by sections 15 and 16 of the Land

(1) [1897] 1 Ir. R. 321.

Act of 1887, and the 20th section of the Purchase of Land Act, 1891.

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The Land Commission have plainly the power to redeem a rent upon a rent. I am of opinion that reading the whole section together, and having regard to the sections conferring the power on the Land Commission, it is the intention of the Act that the Land Judge should have the same powers in cases of sales to tenants.

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Solicitors having carriage in Daly's Estate: *Webb, Scott, and Seymour.*

Solicitor having carriage in Vyse's estate: *F. Kennedy.*

W. G.

IN THE MATTER OF THE ESTATE OF DOMINICK BLAKE
LEONARD, OWNER; EX PARTE GEORGE S. CRISFORD,
PETITIONER, CONTINUED IN THE NAME OF EDWARD H.
SMITHETT, AS PETITIONER.

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March 15.
June 11.

Land Law (Ireland) Act, 1896, s. 40—"Estate"—Part of lands included in absolute order for sale sold after the Act—Jurisdiction to apply 40th section to the remainder.

The circumstance that part of an estate comprised in an absolute order for sale has been sold to tenants after the passing of the Land Law (Ireland) Act 1896, does not preclude the Court from putting section 40 into operation with respect to the remainder of the estate.

MOTION on behalf of the petitioner that a request should issue to the Irish Land Commission under section 40 of the Act of 1896.

The rental of the estate (Killaloonty, in the county of Galway) consisted of thirteen lots. Of these lots, 1-5, 9, 12, and 13 had been sold after the passing of the Act of 1896, and previously to this application. It was proposed that the request should issue with respect to the remaining lots. Whether the Court had jurisdiction to do so was the only question argued, as in all other respects the section was plainly applicable.

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J. H. Shaw, in support of the motion (1).

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June 11.

Ross, J. :—

In this case I am obliged to decide a very important question under the 40th section of the Land Act of 1896. Part of the lands have been sold to the tenants since the passing of the Act of 1896. I have now to decide whether the remaining lots constitute an estate within the meaning of the section, in respect of which I can send a request to the Land Commission.

It has been contended that "estate" can only mean so much of the lands included in the absolute order for sale as consists of tenants' holdings, agricultural or pastoral, or partly agricultural and partly pastoral; that, when part of an estate has been sold, I have no jurisdiction to make a request in respect of the part remaining unsold—which is not an estate but only part of an estate. I have always felt the force of this contention. A sharp distinction has been drawn in the section itself—sub-sect. 1 (*f*)—between an estate and part of an estate. Again, the estate must be some definite quantity of land. The Land Judge, under clause (*d*), has jurisdiction in case a certain proportion of the tenants, in number and value, accept the offers, to coerce the remainder. The foundation of the coercive jurisdiction depends on a proportion of consenting tenants. A proportion implies a defined quantity of land. The recusants have a right to insist that three-fourths in number and value of the tenants on the estate have consented to accept the offer. It is pressed that the only unit to which the proportion can be applied is all the land of the owners comprised in the absolute order for sale, comprising holdings to which the section applies. It is pointed out that the Land Commission have the power, expressly conferred on them, of declaring certain lands to be a separate estate for the purposes of the Purchase Acts, while no such power is expressly conferred on this Court. This is a highly inconvenient doctrine, and would, to a great extent, impede the working of the section.

(1) The question arose in several cases, in some of which the application of the section was resisted. The various arguments are noticed in the judgment in the present case.

I have therefore taken time to consider in what way the difficulty is to be surmounted. Various ways have been suggested. It is contended that I may apply the principle of *Mac Kenzie's Trusts* (1) and *Re Tennant* (2), both of which were approved of by the Court of Appeal in *Mundy's Settled Estates* (3).

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In the first-named case money bequeathed to trustees on trust to be laid out in land in strict settlement was allowed to be invested in Debenture Stock, on the ground that, although the money was to be invested in the purchase of land, if such investment had been made the land purchased could have been sold and the proceeds invested in the desired securities under the Settled Land Act. As the result could be effected by two processes, it was held that it might be effected by one. Applying this principle, when part of an estate has been sold it is in the power of any incumbrancer on the remainder to file a petition praying for the sale of such remainder. In that case the Court, beyond doubt, would have an estate to which the section would apply. It is contended that the parties need not be put to the expense of filing a petition, and that the Court may allow that to be done by one process which could clearly be effected by two (4). I cannot rest my decision on this ground with much confidence.

The Court of Appeal have indicated that the power of this Court, under section 55 of the Landed Estates Act, to sell part of an estate, in case the sale of a part is all that is necessary, remains unaffected by the Act of 1896. The Lord Chief Baron, in *Owen's Estate* (5), says:—"There is another case which I wish to mention, that of an estate over which a receiver has been appointed and which is more than sufficient to satisfy the incumbrances. I hold that it would be against right that in such a case the Court should proceed against the will of the owner to sell more of the estate than was necessary for the purpose of paying off the incumbrances, and I would hold that as soon as the Land Judge has sold sufficient for that purpose he should stay his hand, and therefore that he should not make an offer to the tenants of more of the estate than was necessary." It is

(1) 22 Ch. D. 750.

(2) 40 Ch. D. 594.

(3) [1891] 1 Ch. 399.

(4) This argument had been used in an earlier case by *Mr. Brady*.

(5) [1897] 1 L. R. 240.

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clear that his Lordship contemplated the possibility of a receiver over the whole estate, and the application of section 40 to only a part thereof. I am therefore led to the conclusion that, though not expressly given, I have, by implication, the power to treat part of an estate as a separate estate for the purposes of the 40th section. In the present case, therefore, I shall take steps to have the request issued.

J. H. Shaw asked for a direction (if necessary) that the attendance of counsel to hear judgment might be allowed. He said that there appeared to be some doubt as to the practice in the taxing offices.

Ross, J., said that he would allow the attendance of counsel where judgment was reserved (1).

Solicitors for the petitioners: *Whitney & Moore*.

(1) See *In re De Burgho's Estate*, [1896] 1 I. R. 282. In that case counsel's fees on hearing judgment were allowed by the Taxing Master without any further direction from the Judge.

W. G.

WREN v. STOKES.

Ross, J.
1897.

Sheriff—Fees—Writ of attachment—Non est inventus—Bailiff's fee and mileage—Fee on warrant—Renewal of writ—Order LXV., Rule 90—Schedule App. S, Part 4, Items 1 and 6.

March 25.

Appeal.

April 26.

A sheriff is entitled to a fee of 2s. 6d. on the lodgment with him of a writ of attachment for the warrant to be issued upon the writ by the sheriff to the bailiff; and on the writ being renewed the sheriff is entitled to an additional fee of the same amount upon the renewal. Where the sheriff has failed to arrest the person against whom the writ is issued, and has returned the writ *non est inventus*, he is not entitled to the bailiff's fee and mileage given by the schedule for executing the warrant.

Gibbon v. Buckley (24 L. R. Ir. 423) and *Ryan v. Richardson* (25 I. L. T. R. 24) followed; *Stevenson v. Moorehead and Wood* (30 I. L. T. R. 139) discussed.

APPLICATION that the receiver's solicitors be at liberty to be advised by counsel at the expense of the estate as to their personal responsibility to pay certain fees claimed by the sheriff in respect of a writ of attachment issued in the matter, having regard to the fact that they simply acted in obedience to orders of the Court, and for its officer, and also as to whether the entire claim of the sheriff is sustainable in law, having regard to the fact that neither the writ nor either of the renewals was ever executed, all the charges consisting of expenses of futile attempts at execution, or in the alternative that the amount payable to the sheriff be fixed by the Court.

On the matter coming before the Receiver Judge he directed the matter to be placed in his list on notice to the under-sheriff with a view to determine what portion, if any, of the sum claimed by the under-sheriff against the solicitors for the receiver in relation to the writ of attachment and renewals thereof was legally payable.

It appeared from the receiver's report that his solicitors were threatened with an action by the sheriff of the county of Kerry in

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respect of expenses incurred by him in the attempted execution of a writ of attachment issued in the matter against one Daniel Dalton.

The writ was issued by the solicitors of the receiver pursuant to order of the Court of February 23, 1893, and was lodged with the sheriff for execution on March 11, 1893. On lodging the writ the solicitors gave the under-sheriff a fee of £1 1s., but did not pay him the usual fee of 2s. 6d. for the warrant to the bailiff. The under-sheriff made several attempts to execute the writ, but failed: the writ, which was twice renewed to keep it from going out of force, was ultimately returned *non est inventus*.

The sheriff sent in an account to the solicitors for the receiver claiming £37 6s. 6d. for his services in attempting to execute the writ. This account was made up of three items of 2s. 6d. for the warrant fee—one in respect of the original writ, and one in respect of each renewal—two items of £1 1s. for the lodgment fee on each renewal (this fee on the writ had been paid as above-mentioned), and thirty-four items of £1 0s. 6d. each charged in respect of “bailiff’s fee and mileage on warrant, twenty-six miles.”

Dixon, for the receiver:—

The sheriff is entitled to one fee of 2s. 6d., item No. 1 in Schedule App. S, Part 4, and to no more. He cannot charge on a renewal of the writ the fees he has already received upon the writ itself: the renewal of a writ of attachment is not a new writ: Order XLII., Rules 8 and 21. A new writ of attachment cannot issue without notice to the party: Order XLIV., Rule 2, and no such notice was given here.

No point arises as to the fee given at item No. 2 in the schedule, because the sheriff has been paid it.

The sheriff is not entitled to the mileage fee given at item No. 6 “for executing” the writ, unless he has actually executed the same: *Gibbon v. Buckley* (1); *Ryan v. Richardson* (2).

Morphy, for the sheriff:—

The writ has been renewed twice: warrants had to be issued

to the bailiff on the original writ and on each renewal; the sheriff is therefore entitled to three fees under item No. 1. In the same way he is entitled to three fees under item No. 2, and has only been paid one.

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Stevenson v. Moorehead and Wood (1) is an express authority that the sheriff is entitled to mileage fees under the Rules of 1891, even though the execution is unproductive. *Ryan v. Richardson* (2) and *Gibbon v. Buckley* (3) were decided upon the former rules.

Horner, amicus curiæ :—

Ryan v. Richardson (2), and *Gibbon v. Buckley* (3) were not cited in *Stevenson v. Moorhead and Wood* (1).

Ross, J. :—

I must decide this case according to the rules of law and not on any calculation of what I may deem the fair remuneration of the sheriff. At common law the sheriff was entitled to no remuneration for executing writs. But from time to time various enactments have been made allowing that officer to claim remuneration for certain specified matters. The most recent of these enactments is contained in the Orders and Rules of the Supreme Court, 1893, and it is under the schedule contained in Appendix S, Part 4, attached to these orders and rules that the sheriff must make out his title to the fees which he claims in this case.

The first item which is claimed in the account sent to the receiver's solicitors is a sum of 2s. 6d. for the warrant on the writ. This sum comes within the first item provided in the schedule, and the sheriff is, as was admitted by Mr. Dixon, entitled to this fee. He has not been paid it, and he must be allowed it. The next item in the schedule is a fee "for executing a writ, process, or order of arrest other than an order of committal under the 6th section of The Debtors Act (Ireland), 1872—if the arrest be made at a place not exceeding three statute miles from the sheriff's office by the nearest public road, 10s. 6d. : if at a place exceeding three statute miles, £1 1s." Nothing is claimed by the sheriff, under this item, as of the date when he was handed the writ, because Messrs. White and White paid him the sum of £1 1s., the largest fee to which he could be entitled thereunder,

(1) 30 I. L. T. R. 139. (2) 25 I. L. T. R. 24. (3) 24 L. R. Ir. 423.

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when they sent him the writ for execution. But the writ has been renewed from time to time, and the sheriff claims a sum of £1 1s. in respect of his fee under this item on each renewal of the writ. I do not think the sheriff is entitled to this charge. The fee is given by the schedule for executing the writ lodged with him. That writ must be renewed if he does not execute it while it remains in force, but a renewed writ is not a new writ or a different writ from the original writ; and I can find in the schedule no additional fees given in cases where writs once lodged are renewed.

The fee of 2s. 6d. upon the warrant to the bailiff is a different matter: a new warrant becomes necessary on the renewed writ, and I think the sheriff is entitled to the two sums of 2s. 6d. claimed by him in respect of the new warrants issued by him to the bailiffs.

All the remaining items in the sheriff's account are claimed in respect of "bailiff's fee and mileage on warrant twenty-six miles," and are sought to be supported under item 6 in the schedule. "For the bailiff or bailiffs for executing the warrant, or any writ, process, or order, *if executed* at a place not exceeding five statute miles from the sheriff's office by the nearest public road, one sum of 10s.; *if executed* at a place beyond that distance, one sum of six pence per statute mile, one way in addition." I have no doubt that the sheriff did everything that he could be required to do in his endeavours to execute this writ. Possibly his officers did a little more, for they seem to have driven about the county until the car hire as claimed under this item in the schedule amounts to over £30. However, the man against whom the writ was issued was not arrested; the writ was therefore never executed, and was ultimately returned *non est inventus*. The mileage prescribed in item 6 of the schedule is only payable—by the express terms of that item—"if" the writ be "executed." In my opinion, to satisfy these words, something or somebody must be seized or taken or delivered in execution. That was expressly decided by Gibson, J., on the similar words in the schedule to the rules of 1885 in *Ryan v. Richardson* (1). The opinion expressed by the Judges

(1) 25 I. L. T. R. 24.

in *Gibbon v. Buckley* (1), though not actually necessary for the decision in that case, supports the same view. Counsel for the sheriff has referred me to *Stevenson v. Moorehead and Wood* (2), a circuit decision of Madden, J. However, I do not think that this case is necessarily in conflict with *Ryan v. Richardson* (3). I have been informed by Mr. Horner, who argued it, that the attention of the learned Judge who decided it was not called to either *Ryan v. Richardson* (3), or *Gibbon v. Buckley* (1). With the main point argued and decided in *Stevenson v. Moorehead and Wood* (2), namely, the liability of the solicitor to pay the sheriff, I have nothing to do. That liability is now conclusively established in all cases where the solicitor issues the writ: *Farrelly v. Lynch* (4).

Upon the whole case, therefore, I am of opinion that Messrs. White and White, the solicitors who issued this writ, must pay the sheriff the three fees of 2s. 6d. above mentioned for the warrants issued to the bailiffs: but I am also of opinion that, the sheriff not having executed the writ, is not entitled to claim any sum under item 6 for mileage, or additional fees under item 2 in the schedule upon each renewal of the writ.

W. G.

The sheriff appealed to the Court of Appeal (FitzGibbon, Barry, and Walker, L. JJ.), claiming by his notice of appeal only three mileage fees, one in respect of the original writ, and one for each renewal.

Appeal.
April 26.

Campbell, Q.C., and *Morphy*, for the appellant.

Matheson, Q.C., and *Dixon* for the respondent (the receiver), were not called on.

(1) 24 L. R. Ir. 423.

(2) 30 I. L. T. R. 139.

(3) 25 I. L. T. R. 24.

(4) [1897] 2 Ir. R. 455.

Appeal.
1897.

WREN
v.
STOKES.

FITZ GIBBON, L. J. :—

We are all of opinion that the concluding words of Order LXV., Rule 90, only fix the point at which the fees given by the schedule become payable. The rule does not give any fee, and to ascertain what fees are given we must look to the schedule itself.

It is impossible to construe the schedule, *item* No. 6, as giving the prescribed mileage fee for the bailiff in any case where the writ has not been actually executed. If the bailiff had travelled any number of miles in pursuit of the person to be arrested under the writ, and had ultimately captured him at the door of the Sheriff's Office, the Sheriff, on the plain words of the *item*, could claim no larger sum than ten shillings. This shows that the fee can not be ascertained until the writ has been executed. The Irish schedule and rules omit any provision, such as exists in England, for the expense and trouble of abortive attempts at execution, and we can not give a fee not authorised by the rules.

I may add that I fail to see on what principle we could hold the sheriff entitled to the amount claimed in his notice of appeal, viz. £3 1s. 6d., being the mileage fees for one of several abortive journeys on the original issue and each renewal of the writ. If entitled to anything, he must have been entitled to the whole amount originally claimed, which was calculated upon all the journeys made in his endeavours to arrest the person to be attached.

BARRY and WALKER, L.JJ., concurred.

Solicitor for the sheriff: *Deverell*.

Solicitors for the defendant: *White and White*.

G. Y. D.

KILKELLY v. POWELL (1).

Appeal.
1896.

Will—Construction—“All my estate and interest in the lands of C.”—Beneficial interest in charges on the estate passing. Nov. 20, 25.

A testatrix who was entitled to an estate for life in the lands of C., and also to the reversion in fee in the same lands, subject to the determination of the intermediate life estate of M. P., and who was also entitled to a charge of £1000 on the lands absolutely, and to the reversion in two other charges of £2000 each on the lands, subject to the determination of the life estate of K. in these charges, by her will devised all her estate and interest in the lands to G. P., to whom also she bequeathed all her plate, plated ware, furniture, and pictures. There was no other legatee mentioned in the will.

Held, that the beneficial interest in the charges passed under the devise of all the testatrix's estate and interest in the lands.

By her will, dated 9th February, 1885, Miss Charlotte Powell left her property as follows:—“I devise to my cousin, George Powell, son of my uncle, Caleb Powell, and to his heirs and assigns for ever, all my estate and interest in the lands of Great Connell and town of Newbridge, in the county Kildare; but if he should die in my lifetime, then I devise the same estate to his eldest son, his heirs and assigns. I also bequeath to the said George Powell all plate, plated ware, china, glass, linen, furniture, books, pictures, and everything else of that description which shall be in my dwellinghouse at the time of my death; and if he be not alive at the time of my death, I bequeath the same to his eldest son. And I appoint John Kilkelly and Weldon Samuel Molony, both of Upper Mount-street, in the city of Dublin, executors of this my will; and I direct that the appointment of them as such executors shall not disentitle them, or either of them, to any costs they or he may be properly entitled to as a solicitor in administering to my affairs.”

At the time of her death Miss Powell was entitled to a life estate in the lands of Great Connell, and she was entitled to the

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, BARRY, and WALKER, L. JJ.

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reversion in fee in the same lands, subject to a life estate to her stepmother, Mrs. Maria Powell. There were three charges on the lands of £1000, £2000, and £2000, and the testatrix owned the charge of £1000 absolutely, and she had a reversionary interest in the other two charges, subject to the life estate of a Mrs. Kilpeck.

The proceedings were commenced by summons to administer the real and personal estate of Charlotte Powell against Louis Powell, eldest son of George Powell, who was dead, and Anne Eyre Powell and Lilla Hinton, the two latter being the next-of-kin of the testatrix. The Chief Clerk, by his certificate, returned the three charges of £1000, £2000, and £2000, as outstanding personal estate. The defendant, Louis Powell, took out a summons to have it declared that these charges did not form part of the personal estate. On the 5th November, 1896, the Master of the Rolls gave judgment in his favour, and from that order the other defendants, the next-of-kin, appealed.

Hemphill, Q.C., O'Connor, Q.C., and Moriarty, for the appellants:—

We submit that George Powell was devisee of the land subject to the charges, and that these latter passed to the next-of-kin as undisposed of.

Porter, M.R., considered that the case came within his former decision of *Mackesy v. Mackesy* (1). The words “devise” and “estate” are the proper words to pass real estate: *Longley v. Longley* (2), Shep. Touch. 400; and, as a rule, they will be confined to realty: *Phillips v. Beal* (3); *Buchanan v. Harrison* (4); *Re Clowes* (5); *Neame v. Moorson* (6), a case decided under the Land Tax Acts.

The Right Hon. The Mac Dermot, Q.C., and Joseph H. Moore, for the respondent:—

We rely on the decision of Porter, M.R., in *Mackesy v. Mackesy* (1). If these charges are deducted out of the property, the residue will be worth very little. The testatrix could not have had such an intention.

(1) [1896] 1 Ir. R. 511.

(2) L. R. 13 Eq. 133.

(3) 25 Beav. 25.

(4) 31 L. J. Ch. 74.

(5) [1893] 1 Ch. 214.

(6) L. R. 3 Eq. 91.

LORD ASHBOURNE, C. :—

This case having been at hearing for two days we have had ample opportunity for considering it. It is an appeal from a judgment of the Master of the Rolls, and raises a question on the construction of the will of a lady named Miss Charlotte Powell. Her position with regard to the property on the day she made her will is important, as we have to ascertain her intention. It appears that at the date of her will she was tenant for life of the lands of Great Connell, and she was entitled to the reversion in fee in the same lands, subject to the life estate of Mrs. Maria Powell. Besides this, she was entitled *in presenti* to a charge on the lands of £1000, and she had a reversion after one life in two charges of £2000 each. The charge of £1000 was secured by a long term of years, and the two charges of £2000 were secured by another long term. The only other facts necessary to state is that the nearest relations she had, who bore her own name, were a first cousin, George Powell, and his son, Louis Powell. Now the question on her will is in reference to a clause which I shall read :—"I devise to my cousin, George Powell, son of my uncle, Caleb Powell, and to his heirs and assigns for ever, all my estate and interest in the lands of Great Connell, and town of Newbridge, in the county Kildare ; but if he should die in my lifetime, then I devise the same estate to his eldest son, his heirs and assigns. I also bequeath to the said George Powell all plate, plated ware, china, glass, linen, furniture, books, pictures, and everything else of that description which shall be in my dwellinghouse at the time of my death ; and if he be not alive at the time of my death, I bequeath the same to his eldest son." The questions on the will are comprised in these words. She shows no evidence on the face of the will that she wanted to benefit any human being but George Powell, except her solicitor, who was to be allowed to have his costs, and she had a strong feeling in favour of George Powell, who was the son of her uncle, because she left him all the articles she had, "plate, plated ware, and furniture." The case was argued before the Master of the Rolls, who arrived at the conclusion that the testatrix, who had a life estate in Great Connell and a reversion in the fee, who had also an absolute interest in the charge of £1000, and an interest in reversion in the two charges of

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Appeal. £2000 each, and who said she devised to George Powell “all
 1896. her estate and interest” in the lands, intended that her entire
 KILKELLY interest, as well present as in reversion, in the charges as in
 v. the lands, should pass to George Powell. The counsel for
 POWELL. the appellants, when the case was discussed before us, contended
 Lord that that was too wide a conclusion, and that a narrower construc-
 Ashbourne, C. tion should be adopted, and that we should give a technical con-
 struction to the words “devise” and “heirs” as used by the
 testatrix. On the other hand, we were asked by The Mac Dermot
 and Mr. Moore to say that the Master of the Rolls was right, and
 that the intention and desire should be observed, and that these
 words were used by the testator to give everything that she had,
 or might have, without reservation. It is all a question of con-
 struction, from which we are to deduce the intention. Did she
 intend to carve out of the property she had in these lands such an
 immense proportion of it as these charges would amount to? Did
 she intend to make an exception of such a substantial part when
 she gave “all her estate and interest” in the lands to the devisee,
 when he might thus have been sold out the next day at the suit of
 the executors? I am of opinion that she meant to give no such
 restricted estate or interest, but that she meant to give everything
 she could give. It is conceded on the authorities and on the
 arguments that if all she had were the charge of £1000, and the
 two of £2000 each, and if she had used the words in her will that
 she has used, namely, “devise” and “heirs,” these charges would
 have been captured and would have passed.

I am clearly of opinion that she used words adequate to carry
 the wider interests.

FITZ GIBBON, L.J. :—

I concur. It is true that there is no authority exactly in
 point, because the interpretation of one will only indirectly helps
 the interpretation of another, where the facts and language, though
 similar, are not identical. In wills a somewhat looser construction
 may be adopted, in aid of an intention otherwise ascertained, than
 in the case of a deed. But the intention must, in every case, be
 ascertained from the instrument as a whole. The question is
 whether the words “all my estate and interest” passed all that

the testatrix had in the lands, as well the "landed estate," which was realty, as charges on the land, legal or equitable, which were personalty.

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The words are clearly *capable* of passing any or every such estate or interest, whether legal or equitable, and if she had had but one—say an equitable interest in a money charge upon the lands—it must have passed under this will. She had several. Which, if not all, can be held to pass? She had a present charge of £1000, which was personalty; she had a reversionary interest in two charges of £2000 each, also personalty; she had a life estate and a reversion in fee, which were realty. It is a very slight paraphrase of "all my estate and interest" to say "every estate and interest which I have"; and, when it is shown that the testatrix had several estates and interests, it rests upon those who contend that one only passed, to show that she intended only one to pass. She has given all her estate and interest to the one person for whom she appears to have had any regard, her nearest relation, to whom she has also given a specific legacy. Why is he to get the land burdened with charges which the words of the gift are capable of passing to him as part of the estate and interest of the testatrix in the land? I can find nothing to confine the words to the real estate proper in the lands, they being capable of passing the personalty charges too. Though this case differs very much from *Mackesy v. Mackesy* (1), I think it a very much stronger case in favour of the beneficiary. The Master of the Rolls refers to another case where the subject matter of the gift was limited; and, if such general words would carry property limited in a sort of strict settlement, *a fortiori* property which was not limited, but given absolutely, ought to pass. The gift of the furniture and personal chattels in the house to the devisee is a strong point against the contention that the charges were not intended to pass by the devise of all the estate and interest in the lands. The testatrix must have intended that the chattels should go to the same person to whom she intended to give the place. This conclusion is supported by her omission to refer to any other personalty. She devised all her estate and interest in the lands to her devisee, to whom she gave a specific legacy of all the chattels

(1) [1896] 1 Ir. R. 511.

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connected with the lands. It is now contended that by the mere appointment of executors, she made them trustees for other persons altogether, by virtue of their office, to raise these heavy charges out of the lands, so far ousting the devisee, for the benefit of her next-of-kin, to whom she had given nothing. In my opinion, the words she used were enough to pass, and did pass, all that she had in the lands, either as estate, or as charge, to George Powell.

BARRY and WALKER, L.JJ., concurred.

Solicitor for appellants : *T. V. Ryan.*

Solicitors for respondent : *Moore, Keily, and Lloyd.*

R. D. M.

Ross, J.
1897.
April 30.

IN THE MATTER OF THE ESTATE OF TIMOTHY BUNTON,
TRUSTEE FOR SALE UNDER THE WILL OF JOHN WILLIAM
SCANLAN, OWNER AND PETITIONER.

Absolute order for sale—Trust for sale—Judgment registered after absolute order as mortgage against interest of cestui que trust.

A testator devised lands upon trust for sale and gave one-fifth of the proceeds of sale to P. Afterwards an absolute order for sale was made on the petition of the trustee. C. obtained a judgment against P., and registered it against P.'s estate and interest in the lands. No actual sale had taken place.

Held, that the registration was effectual to create a charge upon P.'s share, and that C. was entitled to have the receiver appointed over the lands extended to his claim under the judgment mortgage.

JOHN WILLIAM SCANLAN, by his will dated the 2nd June, 1876, appointed John Nihill and Timothy Bunton trustees for sale. The testator gave one-fifth of the proceeds of sale to his brother Patrick Scanlan.

The testator died on the 16th July, 1876; and, in the year 1877, Timothy Bunton the surviving trustee filed a petition for the sale of the lands. On the 18th May, 1877, a conditional order, and on

the 1st December following, an absolute order, for the sale of the lands were made. A receiver was afterwards appointed over the lands ordered to be sold (Drewsborough, and other denominations in the county Clare, and Ballinruane in the county Galway.)

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1897.

In re
SCANLAN'S
ESTATE.

On the 22nd of January, 1886, John Crotty entered up judgment in the Exchequer Division against Patrick Scanlan for the sum of £151 12s. 10d. and registered the judgment as a mortgage on the 5th March, 1886, against the estate and interest of Patrick Scanlan in the lands to be sold in this matter.

An order was made on the 26th February, 1889, directing the receiver to pay Patrick Scanlan a fifth share of the rents and profits, and Patrick Scanlan had since been in receipt of about £60 a year under said order.

M. J. Dunn for John Crotty, applied to extend the receiver to his claim under the judgment mortgage.

Mr. Richd. MacNamara, solicitor having the carriage, submitted that the lands were converted into personalty by the will or at least by the absolute order for sale, and that Patrick Scanlan had no interest in the lands which could have been attached by the judgment mortgage.

Dunn :—

The absolute order for sale has not effected a conversion for all purposes. The practice of this Court has always been to put upon the schedule judgment mortgages registered after the absolute order for sale (*Madden's Practice Land Judges*, 3rd Ed., p. 60). If an owner in fee dies, the proceedings are always continued in the name of his heir. Although the lands are devised in trust for sale, the beneficiaries might by agreement between themselves postpone the sale indefinitely and enjoy the land in *specie*. They might even now dismiss the petition. The words in section 7 of the Judgment Mortgage Act are very wide and embrace every estate and interest, legal and equitable.

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Ross, J. :—

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If the *cestui que trusts* under the trust for sale elected to take the lands they could do so, and have the order for sale discharged. I think the judgment could be registered as a mortgage against such an interest, and that an order extending the receiver may therefore be made.

Solicitor for the applicant : *Stephen Hastings*.

Solicitor having carriage : *R. Mac Namara*.

W. G.

Ross, J.
1897.

April 30.

IN THE MATTER OF THE ESTATE OF THE HON. P. E. J. GREVILLE NUGENT, OWNER ; THE MARQUISE DE LA BEDOYERE, PETITIONER.

Defaulting receiver—Bond—Liability of guarantors—Costs of orders against receiver.

The condition of a receiver's bond was *inter alia* that he should pay and apply as the Court should direct, all such sums of money as should be properly chargeable against him.

The receiver made a default in accounting, for which the sureties admitted liability. Orders were made—(a) discharging the receiver ; (b) directing him to lodge his balance in Court ; (c) appointing a new receiver. The petitioner having carriage was declared entitled to the costs of these orders, but the receiver was not specifically directed to pay them.

Held, that the sureties were liable for these costs.

MOTION for an order that the costs of obtaining the orders dated the 24th February, 1897, and 31st March, 1897, and all costs of, and incidental thereto, and all other costs occasioned by reason of the default of the late receiver be paid by the Guarantee Society.

The condition of the bond entered into by the Guarantee Society as sureties for the late receiver was as follows:—"Now, the condition of the foregoing bond or obligation is such that if the above-named do and shall on or before the

17th day of March, 1892, and from time to time thereafter, and as often as he shall be required by the Court, duly account upon oath for all such rents and profits as he shall have received, or without his wilful default might have received, out of the said lands and premises over which he has been so appointed receiver, and shall pay and apply as the Court shall order or direct all such sum or sums of money as shall at any time or times be duly certified to be in his hands or properly chargeable against him as such receiver, and shall in all things diligently and faithfully perform and discharge all and every his duties as such receiver, without any wilful default, that the foregoing bond or obligation shall be null and void, or otherwise that the same shall remain in full force."

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1897.

In re
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ESTATE.

The receiver admittedly was in large default in his accounts, and the Guarantee Society lodged in Court £2221 13s. in discharge thereof. Prior to this certain orders had been obtained by the petitioner, namely, on 24th February, 1897, discharging the receiver, and ordering him to pay into Court his admitted balance, a further order on same day appointing a new receiver, and an order made on 31st March, 1897, giving liberty to the Guarantee Society to make the lodgment. The petitioner was declared entitled to the costs of these orders, but the receiver had not been ordered to pay them.

J. H. Shaw, for the petitioner, referred to *Forster's Estate* (unreported, a decision of *Monroe, J.*, holding the guarantors in a similar bond liable for costs), and *Maunsell v. Egan* (1).

Price, Q.C., for the Guarantee Society :—

The costs have been specifically adjudicated upon by the orders. As to the first order, that of the 24th February, 1897, if the receiver had been thereby ordered to pay the costs of the application, and had failed to do so, there would have been a default for which the Society might be liable. But that order is silent as to costs. Then as to the order of 31st March, 1897, it simply declares the petitioner entitled to the costs of the orders ;

Ross, J. that means entitled in the matter. In *Maunsell v. Egan* (1) there
1897. must have been some default by the receiver in not paying the
In re costs in question.
NUGENT'S
ESTATE.

Ross, J. :—

Mr. Price has made the point that the receiver has not been ordered to pay these costs, and that consequently he has not made any default in respect of costs. Now, it is plain that in the case of these orders the receiver ought to have been ordered to pay the costs; and the matter was not adjudicated upon by simply declaring the petitioner entitled to the costs. That means that they were to be payable by somebody. The receiver was the person who ought to have paid the costs of these motions which were rendered necessary by his default; and I cannot allow justice to be defeated by that omission in the orders.

That being so, I hold that the Guarantee Society are liable, and that they cannot successfully resist this application. They must pay the costs of these orders and of this application.

Solicitors for the petitioner: *Whitney & Moore.*

Solicitors for the Guarantee Society: *Crozier & Son.*

W. G.

THE PNEUMATIC TYRE COMPANY (LIMITED) *v.*
 THE GRAPPLER PNEUMATIC TYRE COMPANY
 (LIMITED).

M. R.
 1897.
 Feb. 9.

(1894. No. 916.)

*Practice—Consent for judgment—Motion on notice—Costs—Order XL., R. 1,
 R. S. C. (Ireland), 1891.*

There is no fixed rule in the Chancery Division that judgment by consent must, in all cases, be obtained by motion on notice for judgment.

MOTION.

The action was brought to recover royalties alleged to be due under a license to use certain letters patent. The defendants had pleaded that they had been induced to take the license by the false representations of the plaintiffs, and they counter-claimed for the rescission of the license.

By consent between the parties (duly signed), dated 25th January, 1897, it was agreed that the whole of the defence and counter-claim of the defendants should be withdrawn and struck out, and that judgment might be entered up by the plaintiffs against the defendants, according to the relief prayed for in the statement of claim, and that the costs of the action and counter-claim should be paid by the defendants to the plaintiffs when taxed and ascertained, including all costs of and incidental to certain law arguments and proceedings in the case, including the costs of discovery, and making the consent a rule of Court, with fee to counsel thereon; and it was provided that the consent should be made a rule of Court.

On 29th January, 1897, the plaintiffs served the defendants with notice of motion for judgment in the terms of the consent and for the costs of the application.

Meredith, Q.C., Fleming, Q.C., and Pim, for the plaintiffs, submitted that the motion was necessary, as judgments by consent, in

- M. R.* 1897. the Chancery Division, must now be obtained by motion under Order XL., Rule 1.
- PNEUMATIC TYRE CO.* They cited Wylie's *Judicature Practice*, p. 578.
- v.*
- GRAPPLER PNEUMATIC TYRE CO.* *The Right Hon. The MacDermot, Q.C., Gordon, Q.C., and Day, contra.*

THE MASTER OF THE ROLLS:—

The plaintiffs are entitled to an order in the nature of judgment pursuant to the consent.

I am not going to lay down an absolute rule that in no case where a defendant has given a consent for judgment in an action, can the plaintiff come into Court and set the matter down for judgment; but it would be a serious thing to hold that defendants should be onerated with the costs of a regular motion for judgment in every case where a consent for judgment is given.

In the present case some motion was necessary—either a motion on notice, or an *ex parte* motion. I shall grant the application, but will say nothing about costs, save as provided for by the consent.

Solicitors for plaintiffs: *Goodbody & Tisdall.*

Solicitors for defendants: *Casey & Clay.*

R. W. L.

IN RE LAFFAN AND DOWNES' CONTRACT.

(1896. No. 908.)

M. R.

1897.

Jan. 18.

Feb. 1.

Vendor and purchaser—Will—Devise ut death of surviving tenant for life to Superioress of Convent—Period at which Superioress is to be ascertained.

A testator devised her share of freehold lands to her brother and sister equally for life, and on the death of either the whole to the survivor, and directed that on the death of the survivor the share should be divided equally between the Superioresses of two convents for the benefit of the schools attached to each. The lands were sold after the death of the survivor. The purchaser required that the person who was Superioress at the date of the death of the testatrix, or her heir at law or devisee, should join in the conveyance.

Held, that the devise meant the Superioress at the date of the death of the testatrix, and not the Superioress at the date of the death of the surviving tenant for life, and that the requisition of the purchaser should be complied with.

SUMMONS.

This was an application on the part of the vendor, Patrick M. Laffan, that it might be declared that the requisitions of the purchaser, Joseph Downes, requiring evidence showing who was the Superioress of the Nuns of North William-street, Dublin, at the date of the death of Mary Anne Lynch, and requiring execution of the conveyance by that person, or by her heir-at-law, or devisee was not well founded, and for a declaration that the proper party to execute the conveyance, as representing the one-tenth of the lands devised by the late Mary Anne Lynch to the Superioress of the Nuns of North William-st., was the Superioress of the said Nuns at the date of the death of Elizabeth Lynch, the last tenant for life.

The facts of the case were as follows:—The lands of Belper Tara, in the county Meath, containing 167A. 0R. 9P.; statute measure, and held for ever, subject to the yearly fee-farm rent of £113 1s. 6½d., were, on the 27th February, 1896, put up for sale by auction, in Dublin, by direction of Patrick M. Laffan. As

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executor and trustee of the late Thomas Joseph Lynch, Patrick M. Laffan was entitled to three undivided fifths of the said lands, and, as executor and trustee of the late Elizabeth Lynch, he was entitled to one other undivided fifth of the said lands. The remaining one-fifth of the said lands belonged to Mary Anne Lynch, who by her will, dated September 20th, 1875, disposed of her share of the said lands, as follows:—

“I devise and bequeath my one-fifth portion or share in or to the lands of Belper, situate in the county of Meath, with all my interest, benefit, or advantage in the same, to my sister, Elizabeth Lynch, and my brother, Thomas Lynch, in equal parts or portions for life, and, on the death of either of them, that his or her share shall go to the survivor. I further will and direct, that in the event of the said Thomas Lynch having lawful issue, and of such child, or children, being brought up Roman Catholics, he shall have the power of disposing, by will, of whatever share or portion he may then have of the foregoing property amongst them; but in case of his having no issue, or failing in the condition already mentioned, that his half, and that of my sister, Elizabeth Lynch, at the death of the survivor, shall be equally divided between the Lady Superioress of the Nuns of North William-street and the Lady Superioress of St. Joseph's, Mountjoy-street, both in Dublin, for the benefit of the schools respectively attached thereto.” By a codicil, dated September 20th, 1875, the testator varied the said devise, as follows:—“I give and bequeath to my brother, David Lynch, in case of his surviving my sister, Elizabeth Lynch, and my brother, Thomas Lynch, and that the said Thomas Lynch should die without lawful issue, the shares of my sister Elizabeth, and of my brother Thomas Lynch, and at the death of the said David Lynch, to be equally divided amongst his lawfully begotten children if he has issue, but if not, then the said shares, as I directed in my will, to the Superioress of the Nuns of North William-street, and the Superioress of St. Joseph's Convent, Mountjoy-street, and I do hereby ratify and confirm my said will in all the other particulars thereof.”

The testatrix died on July 5th, 1880, and on March 6th, 1896, letters of administration (with the will and codicil annexed)

of the personal estate of the deceased, were granted to the said Patrick M. Laffan, the attorney lawfully appointed of Margaret Smith, the surviving executrix in the will and codicil named, till she should apply for and obtain probate. Elizabeth Lynch survived Thomas and David Lynch, and died August 28th, 1894. Thomas Lynch died without issue.

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Joseph Downes, having bid the sum of £6380, was declared the purchaser, and in due course the vendor's solicitor furnished an abstract of title to the purchaser's solicitors.

The purchaser required that evidence should be given who was the Superioress of the Nuns of Mountjoy-street, and of North William-street, on May 5th, 1880, the date of the death of the testatrix, and that these ladies should join in the conveyance. The vendor replied that the Superioress of the Nuns of Mountjoy-street, at the date of the will and the death, was Mrs. Julia O'Connor, that she was still alive, and her execution of the conveyance could be obtained; the Superioress of the Nuns of North William-street was Madame Bonne Francois de Paule Charlotte de Vireu. She died December 12th, 1890, being possessed of considerable property in France, and she disposed of the same by her holograph will, which was admitted to proof in Paris, but according to the law of this country she died intestate, leaving the Comte Aymon de Vireu her heir-at-law; he was an officer quartered at Algeria, and could not be got to execute any assignment, or sign any document.

The Superioress of the Nuns of North William-street, at the date of the death of Elizabeth Lynch, was Mrs. Agnes Robinson, and she was willing to execute the conveyance. The purchaser insisted on title being shown through the lady who was Superioress of the Nuns of North William-street at the date of the death of the testatrix. The vendor accordingly took out this summons to have the question determined.

Miles Kehoe, Q.C., in support of the summons:—

The person to be looked for is the lady who was Superioress at the time of the period of distribution, that is at the death of the survivor of Thomas and Elizabeth Lynch. The principle of

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Cripps v. Wolcott (1) and *Re Gregson* (2), is analogous: See Theobald on Wills, pp. 455, 554. The gifts are, in substance, to the convent schools, and the Lady Superioress is merely the channel through which the gift is to pass.

Herbert Wilson, for the purchaser:—

The Superioress of the Nuns of North William-st., at the date of the will and the date of the death of the testatrix, being the same individual, took a vested remainder (subject to be divested) as a *persona designata*. The nearest class of cases affecting the point at issue between the vendor and purchaser are cited in 1 Jarman on Wills, pages 303 and 304, where the effect of a gift "to the wife of A." (both before and after the Wills Act), is discussed. See also *Re Whorwood*; *Ogle v. Lord Sherborne* (3).

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The cases on survivorship relied on by Mr. Kehoe cannot affect this question, for "survivor" is an ambiguous word, and suggests at once the need of some guidance as to the time at which the survivorship is to be determined. This is not a gift to a survivor, but to a person after the death of a survivor. The case of a gift to the wife of A. is more analogous, bearing in mind that the office or position of Lady Superioress is not that of a corporation; that in law and indeed in fact there may be no Lady Superioress at all *in esse* at any given future time, and that, though the charitable object cannot be defeated for want of a trustee, there might be no trustee to take, in which case the residuary devisee or heir-at-law would take the estates bound by the trust. Admittedly the Superioress, whoever she may be, takes as *persona designata*, just as the wife of A. would take, and in the latter case the rule is clear, as stated by Mr. Jarman, pp. 303, 304. "The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following:—First, that a devise or bequest to the wife of A., who has a wife at the date of the will, relates to that person, notwithstanding any change of

(1) 4 Madd. 11.

(2) 2 De J. & S. 428.

(3) 34 Ch. D. 446.

circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under all circumstances confined to her; but that secondly, if A. have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person either at the date of the will, or at the death of the testator, it shall apply to the woman who shall first answer the description of wife, at any subsequent period." I cannot question that the same rule would apply, if the gift to the wife of A. were stated to be for the poor of the parish, or the like, instead of a beneficial interest. No doubt the equitable interest in the present case will be bound in any event; but it is admitted that the legal title must be made through some Superioress, and it is only a question which, for both cannot take. Some light too is thrown on the question by such cases as *Cocks v. Mannors* (1), and *Delaney's Estate* (2), which show that *prima facie* at least a gift in a will to the members of a religious community means the members living at the testator's death, as *personæ designatæ*, though no doubt the element of charity was largely eliminated from these cases in the view taken by the Court.

In the present will I do not think the word "Superioress" can receive the construction contended for by Mr. Kehoe. See also *Danvers v. Lord Clarendon* (3), which turned upon the gift to the heir of a person, who was to take after a prior gift for life to a third person.

I regret that title will have to be deduced through the Lady Superioress who filled that character in 1880. It is in fact immaterial whether she is to be ascertained as of that date, or of the date of the will, the same person having held the office at both periods: but there need be no great difficulty in so deducing it, by appointing a trustee under the Trustee Acts in room of the gentlemen stated to be abroad, and who, if in this country, would be a mere trustee for the charity.

Solicitor for the vendor: *M. C. O'Meara*.

Solicitors for the purchaser: *Middleton & Son*.

W. L.

(1) L. R. 12 Eq. 574.

(2) 9 L. R. 1r. 226.

(3) 1 Vern. 35.

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V.-C.

1897.

May 10.

SHERIDAN *v.* SHERIDAN.

(1896. No. 1002.)

*Practice—Equity suit transferred from County Court to Lord Chancellor—
Further proceedings and practice—County Officers and Courts (Ireland)
Act, 1877 (40 & 41 Vict. c. 56, s. 37.)*

Procedure and practice in equity suits transferred from a County Court to the Lord Chancellor under section 37 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56).

SUMMONS.

This suit was instituted in the Mayo County Court, by legatees under the will of Patrick Sheridan, for certain special relief, or for the administration of the personal estate of the said Patrick Sheridan.

No statement by way of defence or otherwise (see the County Courts (Ireland) Orders, 1890, Order IV., Rule 7) was served by the defendants.

The case came on for hearing at Swineford on the 11th June, 1896, when it was adjourned to the next sessions to be held there on the 10th October.

On the adjourned hearing the defendants objected that the subject-matter of the suit exceeded in amount the limit of the County Court jurisdiction, and this proving to be the case, and the defendants refusing to consent that the County Court Judge should proceed in the suit, he directed it to be transferred to the Lord Chancellor, under section 37 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). The record was accordingly transmitted and lodged in the Record and Writ Office, where, on the 21st December, 1896, the suit was entered in the Cause Book of the Chancery Division, with the above record number.

On the 1st of February, 1897, the plaintiffs served a notice of motion to the Lord Chancellor for directions as to the further

proceedings in the suit. The notice was entitled In the goods of Patrick Sheridan, deceased; In the matter of the 40 & 41 Vict. c. 56; And in the matter of an equity civil bill between (parties). An affidavit of the plaintiffs' solicitor in the County Court stated the previous steps in the case, and the certificate of the Clerk of Records and Writs showed the lodgment of the record.

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The motion was heard on the 13th of February, 1897; there was no appearance for the defendants; and the Lord Chancellor, the plaintiffs being resident in Dublin, made an order that the suit should be retained in the Chancery Division of the High Court. The record was subsequently transmitted to the Vice-Chancellor's Registrar.

The case was placed in the Vice-Chancellor's list on the 28th of April, 1897, in order that the subsequent mode of proceeding should be determined, when *G. R. O'Connor* appeared for the plaintiffs, and referred to *Martin v. Harman* (1). There was no appearance for the defendants, and the Vice-Chancellor directed the case to stand over to enable the plaintiffs to take out a summons to bring the matter before the Court, in accordance with the practice settled in *Martin v. Harman* (1).

The plaintiffs accordingly took out this summons, asking that the defendants might be directed to file a defence, and for directions as to the time and mode of trial of the suit.

G. R. O'Connor, for the plaintiffs, in support of the application, referred to *Martin v. Harman* (1), pointing out that that case differed from the present, inasmuch as there a defence had been filed in the County Court.

Staunton appeared for Laurence Sheridan, one of the defendants and the executor of the testator.

THE VICE-CHANCELLOR made an order that the defendants should file a statement or statements of defence within ten days after service of the order upon them respectively; and that in default of any such statement of defence being filed within the

V.-C. time aforesaid the usual accounts and inquiry should be taken and
 1897. made, and the personal estate administered.
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 SHERIDAN. Solicitor for the plaintiffs since the transfer: *Friery*.
 Solicitor for Laurence Sheridan: *A. B. Kelly*.

D. M'C. M.

Ross, J. IN THE MATTER OF THE ESTATE OF WILHELMINA
 1897. HERBERT AND ANOTHER, OWNERS; WILHELMINA
 June 14. HERBERT, PETITIONER; CONTINUED IN THE NAME OF
 July 6, 19. HENRY C. HERBERT, HER EXECUTOR, AS PETITIONER.

IN THE MATTER OF THE ESTATE OF THE TRUSTEES OF
 R. OWEN, OWNERS AND PETITIONERS.

Land Law (Ireland) Act, 1896, ss. 31 (1), (8), 40—Sale to tenants, subject to superior interest—Reservation in fee-farm grant of mines and minerals.

Where an application was made by the party having carriage that a request should issue under the Land Law (Ireland) Act, 1896, sect. 40, and it appeared that the lands were held under a fee-farm grant reserving to the grantor all mines, quarries, royalties, and rights of fishing and fowling, the Court, at the instance of the applicant, requested that the report of the Irish Land Commission should be made on the basis of the continuance of these reservations to the grantor.

THESE were applications by the respective petitioners having carriage of the proceedings, that a request should issue to the Irish Land Commission, under the provisions of the 40th section of the Land Law (Ireland) Act, 1896.

Lot 1, in HERBERT'S ESTATE, was held under a fee-farm grant, dated 23rd November, 1861, from Daniel Cronin Coltsman, to Henry Johnston Rae and others, reserving unto the grantor "all manner of mines, quarries of marble, limestone, and tiles, and other stones, and all royalties, rights, and privileges whatsoever, and liberty of fishing, fowling, hunting, and hawking."

Lot 2, on the same estate, was held under a fee-farm grant, dated 16th September, 1863, from Arthur Blennerhassett and others to James O'Connell and others. This grant contained a similar reservation.

Lot 4, in TRUSTEES OF OWEN'S ESTATE, was held under a lease, dated 4th October, 1733, reserving to the lessor all mines and minerals.

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C. W. R. Brady, in making the applications, asked that the Land Commissioners should be requested to make their report on the basis that the sales to the tenants shall be made subject to, and not discharged from those reservations:—

These reserved rights come within the definition of “superior interest,” in section 31, sub-section 8. It has been already held, that the Court has power to sell, subject to some superior interests: *In re Grogan's Estate* (1). These rights, if distributable amongst a number of tenants, would be of no appreciable value to them individually. To the grantor or lessor, on the other hand, they are of substantial importance, and could only be bought up—in some cases at least—at considerable cost. [Ross, J. : Ought I to sell subject to reservation of mines and minerals, without knowing whether any such mines or minerals, in fact, existed?] It would be difficult and expensive, and in some cases, perhaps, impossible to ascertain whether they exist or not. “Minerals” have a very wide signification in the present state of the authorities. *Prima facie* the term includes every substance which can be got from underneath the surface for the purpose of profit: *Hext v. Gill* (2); *Fishbourne v. Hamilton* (3); *Shaftesbury v. Wallace* (4). Supposing that, in fact, minerals lay under an estate, the destruction of the reservation on a number of sales to tenants would effectually prevent them being worked by any body, and thus be a check on industrial development.

The request issued in HERBERT'S ESTATE was “that the report should be made on the basis that there shall, upon such sale, be reserved and excepted to the grantors named in the fee-farm grants under which the estate is held, and to those deriving title under them respectively, the several superior interests by the said fee-farm grants reserved and excepted, other than the rents therein reserved.”

(1) [1897] 1 Ir. R. 321.

(2) L. R. 7 Ch. App. 699.

(3) 25 L. R. Ir. 483.

(4) [1897] 1 Ir. R. 381.

<i>Ross, J.</i>	A similar form of request <i>mutatis mutandis</i> was issued in
1897.	TRUSTEES OF OWEN'S ESTATE.
<i>In re</i>	
HERBERT'S	Solicitors having carriage in HERBERT'S ESTATE : <i>Webb, Scott,</i>
ESTATE.	<i>& Seymour.</i>
<i>In re</i>	
OWEN'S	Solicitors having carriage in TRUSTEES OF OWEN'S ESTATE :
ESTATE.	<i>Baker & Ringwood.</i>

W. G.

H. L.
1897.
July 15.

ROSE v. ROSE.

Will—Construction—Estate tail or estate for life.

APPEAL by the plaintiff from the judgment of the Court of Appeal, affirming the judgment of the Master of the Rolls, *ante*, page 9.

Cozens-Hardy, Q.C. (of the English Bar), *S. Ronan, Q.C.*, and *H. D. Conner*, for the appellant.

Haldane, Q.C., *Right Hon. H. H. Asquith* (both of the English Bar), and *John Leech*, for the respondents, were not called on.

THEIR LORDSHIPS (Lord Herschell, Lord Watson, Lord Shand, and Lord Davey) affirmed the decision of the Court of Appeal (1).

Solicitors for the appellant : *Todd, Dennes, & Lamb.*

Solicitors for the respondents : *Taylor, Son, & Humbert.*

IN RE DOYLE, DECEASED.

BURKE v. DOYLE.

(1894. No. 919.)

M. R.

1896.

Dec. 3.

*Legacy, general or specific—Gift of sum of stock in Railway Company—
Intention of testator—Context.*

A testator, after appointing his daughters M. and E. and another trustees and executors of his will, bequeathed certain pecuniary legacies to the minor children of his deceased son W., subject to the conditions and provisions mentioned, and directed his trustees and executors to invest these legacies in any investments authorised by law for trust funds, or upon the debentures or debenture stock, or guaranteed or preference stock of any Railway Companies of the United Kingdom, with power to vary and discretion to apply the income of such investments for the maintenance and education of the legatees. Testator then directed his executors and trustees to invest £200 in any of the securities thereinbefore mentioned, and to pay the income arising therefrom to C. for her life, so long as she remained unmarried. It was then put in settlement. He then bequeathed to a grandson, when he should attain the age of twenty-four, the sum of £1000, and directed the executors and trustees to invest the legacy in the investments previously authorised, and to pay the income arising from such investments to the mother of the legatee, for his maintenance and education till he should attain twenty-four. Testator then bequeathed his gold watch and chain to another grandson. He then gave and bequeathed to his daughter M. £1000 debenture stock in the G. S. & W. Railway Company, and £500 in preference stock in the same Railway, for her sole use and benefit; and he gave and bequeathed to his daughter E. £1000 debenture stock in the G. N. Railway Company, and £500 in preference stock in the same Company, for her sole use and benefit. Testator then made specific devises of particular portions of his real property, and of an annuity of £12 for the life of a relative charged on such estates or moneys as E. and M. should receive or become entitled to under his will. He directed that the residue of his real and personal estate should be divided into three parts, one-third to be given to M., one-third to E., and one-third to be divided between the children of his deceased son W., and to be paid as therein provided.

At the date of the testator's death he was possessed of the exact amounts of debenture and preference stock in the G. S. & W. and G. N. Railway Companies bequeathed to E. and M., except that the sum of preferential stock of the G. S. & W. Railway standing in his name was £600 and not £500:—

Held, that the legacies to E. and M. were specific.

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SUMMONS.

By his will dated 8th July, 1892, Denis Doyle appointed his daughters, Mary Johanna Burke and Elizabeth Jane Burke and William Walsh executors and trustees of his will. He then bequeathed certain pecuniary legacies to such of the children of his deceased son William as being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and directed his trustees and executors to invest the legacies thereinbefore bequeathed in any investments authorized by law for trust funds or upon the debentures or debenture stock or guaranteed or preference stock of any railway companies of the United Kingdom, with power to vary investments and discretion to apply the income arising from such investments towards the maintenance and education of the legatees, either directly or by paying same to his or her parent or guardian, without being bound to see to the application thereof.

The testator then provided as follows:—"I direct my said executors and trustees to invest the sum of £200 in any of the securities hereinbefore mentioned and to pay the income arising therefrom to my daughter-in-law Charlotte Emily Doyle for her life, so long as she remains unmarried, and if she marries, or when she dies, then to divide the said sum of £200 equally between her daughters Louisa and Mary, if then living, and in the case of one of them dying, to pay the share of her so dying to the survivor, and if both be then dead, the said sum shall form part of my residuary estate. I bequeath to my grandson Denis Burke, when he shall attain the age of twenty-four years, the sum of £1000, and I direct my said executors and trustees to invest the said legacy in the same manner as is hereinbefore directed with reference to the legacies to my deceased son's children, and to pay the income arising from such investment to Elizabeth Jane Burke, the mother of the said Denis Burke, for his support, maintenance, and education until he shall attain his age of twenty-four years. I bequeath my gold watch and chain to my said grandson William Ewart Doyle, out of respect to his father, my late son William Doyle. I give and bequeath to my daughter Mary Johanna Burke £1000 debenture stock in the Great Southern and Western Railway (Ireland) Company, and

£500 in preference stock in the same railway for her sole use and benefit. I give and bequeath to my said daughter Elizabeth Jane Burke £1000 debenture stock in the Great Northern Railway (Ireland) Company and £500 in preference stock in the same Company for her sole use and benefit."

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Testator then made certain specific devises and dispositions of particular portions of his real property and of an annuity charged on the estates or moneys which Mary Johanna and Elizabeth Jane Burke should receive or become entitled to under his will. He directed that the residue of his real and personal estate should be divided into three parts, one-third part thereof to be given to his daughter Mary Johanna Burke, one-third part to his daughter Elizabeth Jane Burke, and the remaining one-third part to be divided between the children of his deceased son William Doyle, to be paid to them as provided in the will.

The testator died on the 16th December, 1893, and probate of his will was, on the 12th Feb., 1894, granted to Mary Johanna Burke and Elizabeth Jane Burke (William Walsh having renounced).

At the date of the testator's death (besides other real and personal property) there was standing in his name £500 Consolidated 4 per cent. preference stock of the Great Northern Railway Company and £1000 debenture stock of the same Company; £600 preferential stock of the Great Southern and Western Railway Company, and £1000 debenture stock of the same Company.

The executors issued a summons for the administration of the real and personal estate of the testator; and the question as to whether or not the legacies of debenture and preference Railway stock to the plaintiffs Mary Johanna and Elizabeth Jane Burke were specific was brought before the Court for decision.

F. F. Ledwich (with him *Matheson, Q.C.*), for the plaintiffs Mary Johanna and Elizabeth Jane Burke :—

The legacies of the Railway debenture stock and preference stock are specific.

No doubt the mere fact that the testator possessed at the time of his death corresponding amounts of stock would not of itself

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be sufficient to make the legacies specific; but in this particular will the intention of the testator is manifested by the context. The order in which the several legacies and devises are placed is very significant, and these particular legacies are inserted amongst and grouped with legacies clearly specific, such as the gift of the testator's gold watch and chain and the devises of particular farms of land.

The modern authorities support the proposition that if from the context and frame of the will enough can be gathered to show that the testator meant to give a specific legacy, then the Court will carry out that intention. In *Pratt v. Pratt* (1) North, J., says:—"One thing that weighs with me strongly is the fact that these three gifts of Consols are throughout associated with a number of other gifts which are, as to three or four of them, clearly specific." In *Bothamley v. Sherson* (2) Sir G. Jessel, M.R., defined a specific legacy, and all the essential elements of that definition will be found present in the gifts here in question. *In re Nottage; Jones v. Palmer* (3) strongly supports the contention that these legacies are specific.

Garrett W. Walker, for the defendants:—

A bequest of stock in a Company is general although the testator may have the exact amount at the date of his will or death: *Simmons v. Vallance* (4); *Wilson v. Brownsmith* (5); *Purse v. Snaplin* (6); *Robinson v. Addison* (7). This general rule of course yields to anything upon the face of the will indicating a contrary intention or showing that the testator meant to deal with the particular sum or sums of stock which he possessed. The will in the present case shows no intention whatever to exclude the application of the general rule; the sums of stock possessed by the testator do not even correspond in perfect exactness with the sums respectively bequeathed.

The fact that the testator directed certain other legacies to be

(1) [1894] 1 Ch. 491.

(2) L. R. 20 Eq. 304.

(3) [1895] 2 Ch. 657.

(4) 4 B. C. C. 345.

(5) 9 Ves. 180.

(6) 1 Atk. 414.

(7) 2 Beav. 515.

invested in railway stocks throws no light upon the nature of the legacies in question, such provision being merely due to the fact that they were bequeathed to one person for life with remainder to infants.

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To hold that the legacies are specific, so far from carrying out the supposed intentions of the testator as shown generally by his will, would on the contrary defeat them, the result being that Mrs. Doyle and her children would receive nothing on foot of the general legacies bequeathed to them.

The residuary gift shows that Mrs. Doyle and her children were equally with the plaintiffs intended to be the objects of the testator's bounty.

The cases of *Pratt v. Pratt* (1) and *In re Nottage; Jones v. Palmer* (2) relied on by the other side, while recognising the general principle, were obviously decided upon special language and circumstances, showing an intention of the testator in each case to dispose of specific existing securities.

Matheson, Q.C., in reply :—

No doubt a gift of so much "Consols" or "stock" without more is not necessarily specific because a testator possesses that exact amount at his death; but slight indications in the will pointing to an intention to give specific gifts will suffice. The Court will consider the whole will, and if it find evidence of intention to give a specific legacy it will hold the legacy to be specific: *Re Nottage; Jones v. Palmer* (2); *Pratt v. Pratt* (1). In this will there is ample evidence of intention to give a specific legacy. This is shown by the direction as to the investment of the property, and the main object of the testator's bounty appears to be to provide for these two daughters out of property which he had.

The decisions in the older cases may be largely explained by the absence of context, *e.g.* *Wilson v. Brownsmith* (3); *Robinson v. Addison* (4); and see *Purse v. Snaplin* (5).

(1) [1894] 1 Ch. 491.

(4) 2 Beav. 515.

(2) [1895] 2 Ch. 657.

(5) 1 Atk. 414.

(3) 9 Ves. 180.

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I am of opinion that this is a specific legacy. The mere gift of a sum of money in Consols or stock without more is not a specific gift even though the testator at the date of his will or death has the identical sum in Consols or stock. Something more is required to show he intended the particular property to pass. But although this is the general rule, yet like every other rule it will yield to a contrary intention if it can be gathered in a legal way from the instrument itself and the surrounding circumstances of the testator. It is not enough to show that the testator has got the particular stock or shares specified in the will, but it is a circumstance to be considered. I do not think that any of the cases which have been cited are conclusive on the point. *Purse v. Snaplin* (1) is a difficult case. There were two different legacies of £5000 South Sea annuities. The testator had South Sea annuities, but only enough to provide for one legacy and not both. There was no language in the will indicating that the testator meant to dispose of his whole property in South Sea annuities, and in the result it was divided between the two legatees, and the executors were directed to purchase £5000 more South Sea annuities out of the personal estate and to transfer one moiety thereof to each legatee. That case does recognise the principle that, in the absence of expressions in the context leading to such a conclusion, the gift of so much stock is not a specific gift. The Lord Chancellor says, "Neither of these is a specific legacy within the strict rules for the reason before mentioned. The testator intended £5000 South Sea stock, which he was possessed of, should be applied in satisfaction of these legacies as far as it would go; as if he had given £5000 in money to Anne Snaplin and Robert Purse, and had only £5000 that must have been applied as far as it would go; and the executors, if the assets were sufficient, must have made up the rest: so it is in this case." That is, there was a legacy to each of so much as would purchase the sum of stock mentioned, and in that sense it was pecuniary and not specific.

As to the general rule to be adopted, *In re Pratt* (2) was relied on; but I do not think it rules the present case, because

(1) 1 Atk. 414.

(2) [1894] 1 Ch. 491.

the legacy in question was stated by the testatrix to be invested in Consols. She had the Consols, and they passed. "Invested" meant "invested at the time of her death," and that was held to be inconsistent with the contention that the gift was not specific.

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Re Nottage ; Jones v. Palmer (1) does not appear to be a conclusive authority, because there was different language in the will from that used here. There were bequests to trustees of "£5000 debenture stock or shares of the London Stereoscopic and Photographic Company, Limited, 350 ordinary shares in the same Company, £1500 debenture stock or shares of the Barton Estate Company, Limited, and thirty-five shares in the Delaware and Hudson Canal and Railway Co., upon trust to continue the same in their present state of investment," or to change the same. This clearly implied that the legacies were as matter of fact invested in the stock and shares of the Companies mentioned, and coerced the Court to come to the conclusion that the legacies were not pecuniary but specific. There was also in that will language used in which the testator refers to the distinction between pecuniary and specific legacies, and the reference to pecuniary legacies does not include those in question.

In both *Pratt's Case* (2) and *Re Nottage* (1) the principle is recognized that notwithstanding the general rule applicable to such cases there are circumstances from which the Court can gather that specific dispositions are intended which may be found in the context, and which the particular clause in question does not contain. In this case it is not on the wording of the clauses themselves that I rest my decision. I have been pressed in argument with the use of the word "in," but I fail to understand the exact force of this contention. The testator says, "I give and bequeath to my daughter Mary Johanna Burke £1000 debenture stock in the Great Southern and Western Railway (Ireland) Company and £500 in preference stock in the same railway for her sole use and benefit." I do not think there is any magic in this use of the word "in," or that it differs from the word "of." I do not think it is equivalent to "invested," because it is physically impossible it can have that meaning. The next

(1) [1895] 2 Ch. 657.

(2) [1894] 1 Ch. 491.

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clause contains a gift to Elizabeth Jane Burke in precisely the same language, except that the Great Northern Railway stock is substituted for the Great Southern and Western. There is nothing in those clauses more than gifts of stock of this description, still they are to be closely scanned.

The object of the testator's will was to dispose of his property mainly in favour of his two daughters and the children of his deceased son ; and he died leaving a large amount of property, as the inventory shows. He deals with his two daughters as *sui juris*. Why, then, should he leave to one £1000 debenture stock in the Great Southern and Western and £500 preference stock in that railway if he meant merely to give her a general legacy ? And why should he leave to the other daughter the debenture and preference stock in the Great Northern Railway if he did not definitely intend that she should have that very same stock ? He did possess (except in one case) the exact amounts of stock at the time of his death, which he mentions ; and he either had them at the date of his will or purchased them afterwards. If these gifts are susceptible of being specific legacies, the fact of his buying them after the making of his will is a stronger fact in favour of that construction, because it was a deliberate act on the part of the testator showing an intention to provide what the will would operate on. But the strongest fact is in the direction as regards the investment of the rest of the property. He says :—
“I direct my trustees and executors to invest the legacies hereinbefore bequeathed,” that is a number of pecuniary legacies “in any investments authorized by law for trust funds” that would include railway debenture stock ; but he goes on, “or upon the debentures or debenture stock or guaranteed or preference stock of any Railway Companies of the United Kingdom, with power to vary the investments thereof from time to time at their discretion, and to apply the income arising from such investments towards the maintenance and education of the said legatees, either directly or by paying same to his or her parent or guardian, without being bound to see to the application thereof.” That shows that, as regards investments, he had a fancy for debenture and preference stocks of a Railway Company. The will goes on :—“I direct my said executors and trustees to invest the sum

of £200 in any of the securities hereinbefore mentioned, and to pay the income arising therefrom to my daughter-in-law, Charlotte Emily Doyle, of 4, Royal-terrace, Kingstown, for her life, so long as she remains unmarried," and he then puts it into settlement. He does not there leave £200 of the debenture or preference stock of the Great Northern or Great Southern Railway, but the sum is left to the executors and trustees, with power to them to invest the sum therein, showing that he knew how to leave a pecuniary legacy as distinct from a specific legacy. Then he bequeaths to his grandson Denis Burke, when he should attain the age of twenty-four, the sum of £1000, and he directs his executors and trustees "to invest the said legacy in the same manner as is hereinbefore directed with reference to the legacies to my deceased son's children," that is under the clause going before, in authorized trust funds, or upon debentures or guaranteed or preference stock of a Railway Company. Why, then, does he depart from that language afterwards? Why does he not say, "I leave to my trustees £1000 or £1500 to be invested by them in favour of each of my daughters?" It is plain that there is a complete difference because he thought that he was doing something quite distinct from what he had done before. That appears to me to throw a strong light indeed upon the question whether he intended to make a specific disposition of the stock or not. And the fact that these two legacies come in the middle of a series of specific gifts, such as the legacy of the testator's gold watch, and so forth, is not to be omitted from consideration; and though I do not so much rely on that collocation, still it does corroborate the inference which one would draw from the facts of the case and from the clauses themselves, viz. that he thought he was disposing of something that he could dispose of *in specie*. What, then, is the reason of his giving the different stock to the two different daughters—the Great Northern for one and the Great Southern and Western for the other, while probably there was little or no difference in the respective value, nor any reason why he should consider one of these securities specially suitable to one of his daughters rather than the other, if he intended to give merely pecuniary legacies to be taken out of his estate? Then the clause at the conclusion of the will, in which

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the two daughters are left as residuary legatees throws a strong light on the case. He intended to dispose of specific property in favour of the two daughters before he leaves the residue to the same persons. Therefore, although the general rule is one that is not to be shaken at all without higher authority than I can bring to bear on it, yet it seems to me the context of this will enables me to do what I have no shadow of doubt was the intention of the man, and consequently I hold that the gifts in question are gifts *in specie*.

Solicitors for the plaintiffs: *D. & T. Fitzgerald.*

Solicitor for the defendants: *R. H. Beauchamp.*

R. W. L.

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Joint Stock Co.—Rights of debenture holders—Sales in the ordinary course of business.

A distillery Company, registered under the Companies Acts, had, for the purpose of raising capital, issued as a first charge on all the property of the Company debentures, which were secured by a trust deed executed at the time of their issue. By the terms of the debentures and the trust deed the Company was to be at liberty (notwithstanding the charge thereby created) in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with, all or any part of the said property until the principal money thereby secured became payable, but nothing should authorise the creation of any mortgage or charge upon the said property, or any part of it, in priority to the debentures. The Company, being subsequently in want of money to carry on its business, and unable to borrow in consequence of the debentures, it was agreed that a syndicate (representing certain creditors of the Company) should purchase a certain amount of whiskey from the Company at a named price, and that the money so paid should be applied, under the direction of the

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syndicate, in satisfaction of the trade debts and other pressing liabilities of the Company. None of the syndicate, or of the creditors whom they represented, were engaged in the whiskey trade :—

Held (reversing the decision of the Vice-Chancellor), that, having regard to the position in which the Company was placed, the sale was one in the course of business.

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THE Old Bushmills Distillery Co. was incorporated on the 31st October, 1891, under the Companies Acts, 1862 to 1890. For the purpose of raising funds necessary for carrying on its business, the Company, in the month of November, 1891, issued debentures to the amount of £100,000 as a first charge on the property of the Company, and these debentures were secured by a trust deed, dated the 12th January, 1892. [The full terms of the trust deed and the form of the debentures are fully set out in the report of another claim against the assets of this Company in liquidation, see [1896] 1 I. R. 303-305.] So far as the argument in the present case was concerned, the clauses of importance in the debentures were clauses 4 and 5, which were in the following terms :—

4. Notwithstanding the charge hereby created, the Company shall be at liberty, in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the said property, until the principal money hereby secured becomes payable in accordance with the conditions hereof, and then the liberty and authority to the Company hereinbefore given shall forthwith cease and determine, and the charge by this debenture created shall and may be immediately enforceable, subject however to the provisions of said indenture.

5. Nothing herein contained shall be taken to authorise the creation of any mortgage or charge of or upon the said property, or any part thereof, having priority over, or equal rank with, the said charge hereby created.

Although the Company was doing a fair amount of business, the sales did not nearly represent the quantities of whiskey which the distillery was producing, and in consequence large stocks of whiskey were accumulated, which entailed financial obligations, and it was necessary that the Company should have facilities for

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discounts from the local Banks and such other sources as were available. The Belfast Warehouse Co., from which the Bushmills Co. had obtained assistance, went into liquidation early in the year 1894, and as Mr. James Steen Boyd was a director of both Companies, the Bushmills Co. lost considerably in credit by the fact of the failure of the Warehouse Co., so that in April, 1894, the Bushmills Co. was practically at a stand still for want of cash to carry on its business.

On the 17th April, 1894, a meeting was held in Belfast at the office of Jaffe Brothers, to consider the position of the Bushmills Co., at which there were present a large number of creditors of the Company, Mr. Kyle Knox (representing the Northern Bank), Mr. Connor, Mr. Jaffe, who were all creditors, Mr. Johns (representing the Belfast Bank, the bankers of the Company), Mr. Brett, a solicitor, and Mr. Boyd, as a director of the Company. Mr. Boyd presented a statement of the accounts of the Company, and stated that it was absolutely necessary that the Company should obtain an advance of money, and that one of the pressing engagements that was just coming due was the interest on the debentures. There was a large amount of malt in stock, which required to be worked up or else it would be sacrificed, as the season for distilling was about to close. It was proved that the creditors all knew that no valid pledge of the property of the Company could be made, in consequence of the terms of the debentures. After a full discussion it was agreed to at the meeting that the Northern Bank, the Belfast Bank, Jaffe Brothers, and Connor should purchase from the Bushmills Co. in equal shares 40,000 gallons of whiskey at 2s. 6d. a gallon, which was equal to £5000. The whiskey was to be sold, invoiced, and bonded in the name of C. H. Brett, on behalf of the purchasers. The purchase-money was to be paid by Brett, by cheque on the Belfast Bank, issued daily on the certificates of W. S. Boyd and A. P. Swan, who were to certify that the amounts were required to meet the daily wants of the Company, excluding all financial bills, after crediting the Company's daily receipts. When the first £5000 was exhausted, the parties were to repeat the advance, if it was then found necessary. Mr. Connor being unable subsequently to carry out his share in the purchase, it was agreed that the two Banks should

take his share. The sum of £10,000 was paid by C. H. Brett for the whiskey, which was applied thus—£2500 in payment of interest on the debentures, £2500 for other pressing creditors, and £5000 for materials to complete the season's distilling. The details of the purchase were carried out in the usual way. Contracts were prepared and signed by Boyd as managing director, and signed by Brett as purchaser, and accounts, invoices, and cheques were exchanged, the Distillery Co. giving receipts for all the payments made.

Transfer orders were prepared and given to Brett by Boyd, after which the necessary excise certificates were obtained. Policies of insurance were afterwards taken out to insure this whiskey, the premiums on which were paid by the purchasers.

The price of 2s. 6d. a gallon was stated to be the average price at which new Bushmills whiskey was sold at the time on the London market. In the month of June, 1894, a further purchase was made by the same parties in the same manner, bringing up the total amount of the sales to £14,053.

On the 14th August, 1894, the Bushmills Company went into liquidation. On the part of the debenture-holders evidence was given to show that 2s. 6d. a gallon was far below the market price for the whiskey, which was 3s. 9d. a gallon; that the sale was a colourable one, and that the Company could have purchased back the whiskey at any time at the price. The whiskey was, at the date of the resolution to wind up, in the stores of the Company.

An application was made to the Vice-Chancellor on the part of C. H. Brett for an order that the liquidator should deliver up the whiskey to him, and on the 25th June, 1896, the Vice-Chancellor refused the application. From that order Mr. Brett appealed.

Serjeant Dodd, Meredith, Q.C., and Jefferson, for the appellant :—

This transaction must be considered having regard to the position of the Company in April, 1894. It was unable to carry on at all unless it got an immediate advance, and it could not give security for a loan in consequence of the terms of the debentures. The parties were all aware of this, and the motive of the

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parties to the transaction shows clearly that they intended a sale and not a mortgage. If the Company were in a thoroughly sound condition it would be a different matter, but considering the circumstances in which the Company was placed at the time, this was a sale in the course of business. It was always lawful for a Company which had issued debentures to make a sale under the circumstances : *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1); *English & Scottish Investment Co. v. Brunton* (2); *Robson v. Smith* (3); *Yorkshire Railway Wagon Co. v. Maclure* (4); *Hubbuck v. Helms* (5); *National Mercantile Bank v. Hampson* (6); *In re Florence Land & Public Works Co.* (7). The case of *Wilmott v. London Celluloid Co.* (8) is strongly in our favour, because there two of the directors paid a due to themselves.

Gordon, Q.C., and *J. H. Moore*, for the liquidator, and *Stanley, Q.C.*, and *Denning*, for the debenture holders :—

We say that this was not a sale in the course of business, but merely an attempt to defeat the debenture-holders by a colourable mortgage. There was no payment in the sense of a cash payment, but Brett on behalf of the syndicate had the power to say who was to be paid, and who was not. There was therefore a condition attached to the money, when received, which prevented it being a sale out and out. The intention of the parties must control the effect of the transaction : *Senécal v. Buzée* (9). The intention of the parties was to obtain some capital to carry on the business, until they sold the business to some London financiers. The license to deal with goods and property, contained in the debentures, and the trust deed, must be exercised in a reasonable manner, and not for the purpose of defeating the rights of debenture-holders by a mere ruse : *Taylor v. M'Keand* (10); *The Florence Land Investment Company* (7).

The price paid for the whiskey was too small; the average

(1) 29 Ch. D. 715.

(2) [1892] 2 Q. B. 1.

(3) [1893] 2 Ch. 118.

(4) 19 Ch. D. 478; 21 Ch. D. 309.

(5) 56 L. J. Ch. 536.

(6) 5 Q. B. D. 177.

(7) 10 Ch. D. 530.

(8) 31 Ch. D. 425; 34 Ch. D. 147.

(9) 14 App. Cas 637.

(10) 5 C. P. D. 358.

price for the whiskey of the Company was 3s. 9d. a gallon, 50 per cent. above the price at which the whiskey was sold.

None of the parties who took the materials had anything to do with the whiskey trade; two banks and a solicitor were the purchasers; and that cannot be said to be in the ordinary course of business; *Payne v. Fern* (1). It is clear that if the Company had prospered and made money, the syndicate would have returned the whiskey to the Company at the named price.

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The question arose in this case in consequence of the liquidator having applied to the Vice-Chancellor for directions whether he was to deliver up to Mr. Brett certain whiskey, or whether he should hold it for the debenture-holders.

It appears that this Company was formed some few years since, and issued certain debentures, and executed a trust deed to further secure the debenture debt. By these documents the undertaking and all the property, present and future, of the Company, were charged with the debenture moneys, as a first charge thereon. The Company was to be permitted, until default in payment of interest, &c., in the course of its business, and for the purpose of carrying on same, to use, sell, or otherwise deal with the mortgaged premises, but so that it was not to be at liberty to create any mortgage or charge on same, in priority to or overriding the deed or the debentures, and the latter were to take precedence over all moneys which might be raised by the Company by any means whatsoever.

It also appears that the Company, in April, 1894, were pressed for money owing to the failure of the Belfast Warehouse Company, and of Mr. Connor, but were believed to be otherwise quite solvent, and to have good prospects if it could tide over its crisis.

A meeting was held on the 17th of April between representatives of the two Belfast banks, Mr. Jaffe and two directors of the Company, when the position and prospects of the Company were discussed, and the best means of keeping it going, in its course of business, debated.

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It was known to all that the existence and form of the debentures and the trust deed precluded the possibility of a mortgage or advance, and that the only way to enable the Company to continue its work and business was for some of the parties present to form a syndicate to purchase £10,000 worth of the whiskey out and out.

An objection to the price of 2s. 6d. a gallon appears to have been at first taken by Mr. Boyd, but subsequently abandoned. The method of payment was not cash down, but to pay from time to time as the exigencies of the Company demanded, in order to enable its work to be carried on. Some such method was needed to ensure that Mr. Boyd would not use any of the money for his own mercantile exigencies, and also to ensure that in the most effective way the Company would be kept a going concern.

At the end of May or beginning of June, 1894, a similar meeting was held, and it was arranged that (the £10,000 having been spent by and for the Company) a further sum of £5000 should be paid and applied in exactly the same way. In August, 1894, the Company had to go into liquidation, and a contest has arisen between the debenture-holders and the syndicate in respect of the whiskey dealt with on the occasions I have mentioned. Originally there were £100,000 debentures, but I believe they are all now paid except £1400 or £1500.

It was conceded before the Vice-Chancellor that there was no fraud. The Vice-Chancellor expressly so held; but he was not so clear as to whether the whiskey was sold out and out. His language is somewhat doubtful on the point. I cannot, however, doubt myself on the evidence that the transaction was a sale out and out. All the affidavits (save that of the liquidator) are quite clear and express on the subject, and Boyd in his oral evidence (152) says that Brett said he would have nothing but an out and out sale.

The main point on which the Vice-Chancellor decided in favour of the debenture-holders was that the transaction was not in the ordinary course of business. The principal reasons that the learned Judge suggested for this conclusion were:—1st, that the parties knew of the debentures, and were seeking to

get money to carry on the business notwithstanding; 2nd, that the price was too low; and, 3rd, that the method of payment was not cash down.

I do not think any of these reasons valid. It never was denied that everyone knew about the debentures—their holders were even indirectly represented at the meeting. The price for such a large lot was not proved to be too low; and the method of payment was the most prudent in the interests of the Company. The Vice-Chancellor had not the benefit of the full citation of cases that we have had here: indeed, in addition to the two cases of *Ex parte Bryden* and *Ex parte the Bank of Ireland*, (1) *In re* this Company, which are entirely distinguishable, and where the transactions were obvious pretexts and devices to defraud the debenture-holders, no case was cited but the *Yorkshire Wagon Company* (2)—most important, no doubt, but only one of a series of authorities which go to show how “course of business” is interpreted, and how Courts are now anxious to uphold all reasonable *bona fide* transactions that are entered into for the purpose of keeping up the business of a Company and saving it from collapse or paralysis from want of the sinews of war.

I shall refer to some of the cases in order to show that the current and tendency of authority is to give a wide and liberal meaning to the expression “course of business”—the word “ordinary” has no place properly at all in the phrase. In *The Panama, New Zealand, & Australian Royal Mail Co.* (3) Lord Justice Giffard, affirming Malins, V.C., gave a judgment of importance. A Company having the power, issued mortgage debentures charging “the undertaking and all sums of money arising therefrom” with the repayment at a specified time of the money borrowed with interest. Before these debentures became due the Company was wound up, and the ships were sold; it was held that the debenture-holders acquired a charge upon all the property of the Company by the term “undertaking.” Lord Justice Giffard said:—“The word ‘undertaking’ necessarily infers that the Company will go on and that the debenture-holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the

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(1) [1896] 1 Ir. R. 301, 329. (2) 19 Ch. D. 478; 21 Ch. D. 309.

(3) L. R. 5 Ch. 318.

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payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this: that the Company might go on during that interval, and furthermore that during the interval the debenture-holder would not be entitled to any account of mesne profits or of any dealing with the property of the Company in the ordinary course of carrying on their business."

The next case is a decision of the Court of Appeal: *In re Florence Land & Public Works Co., Ex parte Moor* (1). It was heard before Sir Geo. Jessel, M.R., and James and Thesiger, L.JJ., who were all Judges of the highest eminence. The main question discussed was whether "obligations" or debentures constituted a charge on property of the Company. It was held that they did—subject to the power of the directors to dispose of any part of such property in the ordinary course of their business. This case was expressly approved by Sir George Jessel, M.R., in *Colonial Trusts Corporation, Ex parte Bradshaw* (2), and it will well repay perusal in detail to see how the matter was dealt with by the learned Judges. I shall read a passage from the judgment of Lord Justice James. At p. 546, he says:—"I am of opinion that the law does allow such a Company as this to charge its undertaking, meaning by 'charging the undertaking' charging the assets for the time being. I am therefore bound to express my opinion that the Company was not guilty of any fraud, that it was not guilty of any intent to take in people by representing that they could give them a security when they were only putting them under an obligation not to sue for a certain number of years for the money they were lending. If the Company did not mean to do that, but did mean to give a security, they have used the words which were calculated to make them honest people, that is to say, to give a charge by way of priority to the persons whose money they were borrowing for the purposes of the Company. Therefore I am of opinion that in this document these words were not surplusage, but were used *bona fide*, and were intended to have an effect which is capable of being given to them in the way suggested, namely, by creating a charge upon the assets for the time being. Of course that would leave them masters to deal with the

(1) 10 Ch. D. 530.

(2) 15 Ch. D. 465, 472.

property as long as the Company remained a going concern, just as Lord Justice Giffard said in the case before him, the Company being a Company capable of buying property, selling it, disposing of it, and making specific mortgages upon it, that they were to go on doing that according to the constitution of the Company, all which the persons lending money must have known. Reading it, as I do, as a charge upon the assets for the time being of the Company, that would not in the slightest degree interfere with the Company carrying on the business for which it was incorporated."

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The next case is *In re Hamilton's Windsor Ironworks* (1). In that case it was held that a mortgage of the property and undertaking of a Company to secure debenture-holders does not prevent the Company from making a valid charge on a specific asset as a security for an advance of money necessary for carrying on the business. A trading Company has general powers to borrow money to an extent reasonable and necessary for the purpose of the business. In giving judgment, Vice-Chancellor Malins said (at p. 710):—"It had been decided, and was not disputed on either side, that the effect of such a deed was an assignment of all the property of the Company. But in what sense was it an assignment of all the property of the Company? Did it mean that the Company was thereby disabled from carrying on its business? Certainly not. It might be that the assignees under such a deed had a right, whenever they thought fit, to enter into possession of the property and stop the operations, but the meaning of the deed was that the Iron Company was to be left perfectly at liberty to carry on their business, though all the property of the Company was included by an assignment of the undertaking. In fact the Iron Company continued to carry on their business uninterrupted by the Credit Company, and as incidental to the carrying on of their business they had power to do all things that were necessary for the purpose." Further on in his judgment, he says,—“Now, it is not necessary to go minutely into all the authorities that have been cited. I think they all agree; but if authority is needed the point is perfectly plain from the case of *In re Florence Land & Public Works Co., Ex parte Moor* (2) in which, curiously enough, the

(1) 12 Ch. D. 707.

(2) 10 Ch. D. 530.

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Master of the Rolls decided contrary to his previous decision. It was an appeal from the Vice-Chancellor Hall, who had followed the decision of the Master of the Rolls; and the Master of the Rolls reversed himself and the Vice-Chancellor Hall at the same time, as they had decided that under such circumstances, there being debentures containing the usual words of assignment of the undertaking, the Company were in fact completely paralysed, as this Company would have been. In that case a Company gave power by its articles of association to its directors, in order to the management of the Company, to borrow money by mortgage on any part of the property of the Company, and the Company in pursuance of these powers issued obligations, by each of which they purported to bind themselves, and all their estate, property, and effects, to repay the sum of £100. And it was held that, construed in the light of the articles of association, the bonds constituted a charge on the property of the Company for the time being, subject to the power of the directors to dispose of such property in the ordinary course of the business for which the Company was constituted. And Lord Justice James held that the bonds would constitute such a charge independently of the articles. That was the decision reversing, upon mature consideration, the Master of the Rolls himself and also Vice-Chancellor Hall, and I am bound by the reversal; but not only am I bound by that reversal, but I entirely concur in it, and I hold it to be the law that when a general mortgage of this kind is taken, whether it be by a form of debenture, or, as in the present case, by a general assignment of the property of a Commercial Company that, in my opinion, necessarily leaves that Commercial Company in possession of their property for the purpose of carrying on their business in the usual way, and of doing all things necessary to enable them to carry on the business to advantage. Amongst those must necessarily be the power of borrowing for the purpose of paying wages and buying materials."

The next case is *The Yorkshire Railway Wagon Company v. Maclure* (1), a case of great importance decided by Sir George Jessel, M.R., and Lindley and Holker, L.JJ. A Railway Com-

(1) 21 Ch. D. 309.

pany being in want of money, and being advised that they had no power to borrow, sold part of their rolling-stock to a Wagon Company for £30,000, at the same time making a contract with the Wagon Company for the hire of the same rolling-stock at a rent which would repay the £30,000 with interest in five years, and then for its repurchase at a nominal price. At the same time three of the directors guaranteed to the Wagon Company the payment of the rent. The Wagon Company brought an action against the Railway Company and the sureties for non-payment of rent due. Kay, J., held that the transaction was void as against the Railway Company—as a mere device to conceal a loan—which was the first idea. The Court of Appeal, however, held that this was not a borrowing but a *bona fide* sale and hiring of the rolling-stock, and was valid. The debenture-holders were not represented, but the right to use the rolling-stock in the ordinary course of business was well put by Sir George Jessel, M.R. The borrowing powers of the Company would not have permitted a loan, and therefore the validity and reality of change from loan to sale were at issue. Lindley, L.J., pointed out that it was a real transaction, not struck at by the Act.

In *Wheatley v. Silkstone & Haigh Moor Coal Co.* (1) the question came before North, J., who reviewed all the cases and had present to his mind that the debentures were a first charge on the undertaking. The facts were these:—The Directors of a Company, with power to borrow and create debentures, issued debentures purporting to charge the undertaking and effects of the Company with payment of the sums mentioned in the debentures to the intent that the debentures might rank equally as a first charge on the Company's effects. They afterwards, in consideration of £4000, advanced and applied for purposes of the Company, deposited with the plaintiff the title-deeds of the colliery of the Company, and by a written agreement charged the property comprised in the deeds, with the payment to the plaintiff of £4000, with interest. North, J., held that the mortgage had priority over the debentures, and said:—"I find that the debenture is intended as a general floating security over all the property of the Company

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In re venting, the carrying on of the business in all or any of the ways
 OLD in which it is carried on in the ordinary course; and inasmuch as
 BUSHMILLS I find that in the ordinary course of business this mortgage was
 DISTILLERY Co.; made, it is a good mortgage upon, and a good charge upon, the
Ex parte property comprised in it, and is not subject to the claim entered
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In *Brunton v. Electrical Engineering Corporation* (1), a Company issued mortgage debentures, charging all its undertaking and property, one of the conditions of the debentures being that they were to rank *pari passu* as a first charge and to be a “floating security,” but so that the Company should “not be at liberty to create any mortgage or charge in priority to the said debentures.” Subsequently an order appointing a receiver was made in a debenture-holder’s action, the Company being ordered to deliver up to such receiver all documents relating to the property comprised in the debentures. The Company’s title-deeds were then in the possession of their solicitor, who refused to deliver them up, claiming a lien for costs incurred by the Company to him as their solicitor prior to the appointment of the receiver. It was held that so long as the debentures continued to be a “floating security”—that is until the appointment of the receiver—they did not interfere with the Company’s business being carried on in the ordinary way, and the debenture-holders could not prevent the Company’s solicitor from acquiring the ordinary solicitor’s lien.

In *Robson v. Smith* (2) it was decided that the holder of a debenture, if the Company has not been wound up and a receiver has not been appointed, cannot require by notice that a particular debt owing to the Company shall be paid to him and not to the Company; and *a fortiori*, if a garnishee order absolute has been obtained attaching the debt, the garnishee may pay it to the judgment creditor, notwithstanding any such notice. In giving judgment Romer, J., said:—“Debentures constitute what is called a ‘floating’ security, that is to say, they allow the Company to deal with its assets in the ordinary course of business

until the Company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders, or, as it has been said (see *In re Standard Manufacturing Company* (1)), they constitute a charge, but give a licence to the Company to carry on its business."

The last case reported on this question is *The Government Stock and Other Securities Investment Company v. The Manila Railway Company* (2). There a Company issued debentures by which it undertook to pay the principal at a distant day and interest on fixed days half-yearly, and charged by way of floating security all its property, present and future. A condition indorsed on the debentures provided that, "notwithstanding the said charge," the Company might, in the course and for the purpose of its business, sell or otherwise deal with its property until default should be made in payment of interest for three months after the same should have become due, or until an order or resolution for winding up. After an instalment of interest had been due more than three months, but before the debenture-holders had taken any step to enforce their security, the Company by an issue of bonds mortgaged specific assets: it was held that the debenture-holders were not entitled to an injunction restraining the Company from paying interest to the bond-holders. In giving judgment in the House of Lords, Lord Halsbury said:—"Now what is this instrument? It is a debenture upon which it is intended that money should be lent to a Company which makes its money by trade, and I am asked to suppose that it was the intention of this condition that upon default being made in the additional period of grace given, from that moment the whole of the commercial conduct of this trading Company was to come to an end. I entirely repudiate the idea that Mr. Farwell has suggested as to standing by and not interfering, and so on. The parties contemplated that the thing might go on and not be wrecked by mere lapse of time. That is the security which they had in their minds. The effect of Mr. Farwell's construction would be not such a security as was agreed to. I must construe the document as it is; and looking at the document as it is, it appears to me that it

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(1) [1891] 1 Ch. 641.

(2) [1897] App. Cas. 81.

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would be so absolutely unworkable in its operation that I do not think the parties could have contemplated such a condition of things as this—that the moment the period of grace had elapsed, at that moment the power of the Company to do anything with the property of the Company ceased.”

These authorities are strong and consistent to show that the Courts consider that what is necessary to *bona fide* keep the works going, what is required to prevent stoppage or paralysis will be upheld as done in the course of business.

In the present case one-fourth of the £10,000 was applied actually to pay interest on the debentures, and if the business had been brought to a full stop in April, 1894, the chances are that the debenture-holders, and everyone else connected with the Company, would have been seriously damaged. The Company in the result was not able to survive its difficulties, but it was given a real help by this transaction, which was, I think, honestly conceived to maintain the course of its business. It would not be fair to condemn it, because experience has shown that it did not save the Company. I therefore think that the contention of the debenture-holders must fail, and that the order of the Vice-Chancellor must be reversed, and the appeal allowed with costs.

LORD JUSTICE BARRY, who heard the argument, but is unable to be present to-day, asked me to say that he entirely concurs in the order I have proposed.

FITZ GIBBON, L.J. :—

This case is no exception to the general rule that the applicability of authorities and the conclusion of the Court usually depend upon ascertaining the facts rather than upon any matter of law. The cardinal question of fact is whether the impeached transaction was a sale in the course of the Company's business. That business was the manufacture of whiskey for sale, and the sale of whiskey when manufactured. The ordinary course of business was to make the whiskey first and to sell it afterwards: providing the means of making new whiskey by selling older whiskey. It has been proved to my satisfaction that this was a sale. Mr. Boyd's policy of storing whiskey, in the hope of obtaining an enhanced price by selling it when matured, had got the Com-

pany into straits for cash. This was necessarily a speculative policy. The price obtained from Mr. Brett was not the speculative price which Mr. Boyd's policy aimed at maintaining, but it was a fair market price for new whiskey, and, in deciding the price to be a fair one, we may take into account that the Company was not, in this transaction, continuing any further the policy of keeping whiskey to mature. I hold that it was a sale out and out, passing the property absolutely and completely to Mr. Brett, as between him and the Bushmills Company, whatever may have been the arrangements between him and those who supplied him with the money. It was not a sale to pay an old debt, nor a sale to a pressing creditor. It was a sale for money, which was to be placed at the disposal of the Company for the purpose of carrying on their business, and there was no fraud, and no collateral contract or concealed understanding as to re-purchase or redemption. The object which was in the minds of the parties could be attained only by a sale. Knowing of the debentures, they knew that no transaction by way of loan on security could be carried out. Therefore, so far as regards one side of the bargain—namely, the conversion of the whiskey into money—I am entirely satisfied that there was a sale in the course of business.

But the other side of the transaction—namely, the mode and terms of payment—must also be looked at, and was certainly not “ordinary” in the sense of “usual.” In many cases the mode and terms of payment might afford evidence, and even conclusive evidence, that the transaction was not a sale in the course of business. The mode and terms of payment might be such as to take the whole transaction out of the course of the seller's business. This side of the question is not altogether free from difficulty here. I think it must be conceded that the purchasers had a motive in buying other than that of becoming owners of whiskey. They were interested in keeping this Company going, and in making the business run longer than it otherwise would; but, if that was their motive, instead of negating a sale, it goes to prove that this was a sale for the very purpose of keeping the business going.

Again, in many a case it might not be “in the course of business” to make a large sale, for the object might be merely to postpone

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an evil day, or to keep up a sort of galvanized existence; in fact, to keep a business apparently going, which really had, or ought to have, come to an end. But in my view, the facts here, including the mode and terms of payment, all tend to show the honesty of the transaction as a reasonable and proper dealing, intended to keep the business really going, and this was none the less true because there was an idea of making it a permanently going concern by selling it to advantage. The object, nature, and effect of the stipulations, as to the payment of the price, were not to restrict or alter the nature of the transaction as a sale, but to regulate the disposal of the purchase-money in the way that was believed to be most beneficial to the Company for the purpose of permanently benefiting it and its business. The price became an absolute asset of the Company. Part of it went to buy materials, part to pay wages, and part of it to discharge immediate liabilities, including interest on the very debentures whose holders now object to this sale. In other words, part of the course of business which was actually carried on by means of this transaction was paying current interest on the debentures, which were, no doubt, charged on the undertaking, but the normal fund for paying such interest was money produced by the sale of manufactured whiskey. The debentures are a floating security, always subject to the continual ebbing and flowing under them of the working capital of the undertaking—the conversion of money into goods, and of goods into money, and back again. It is upon this view of the subject that the authorities to which the Lord Chancellor has fully referred, are of use. Some of them go further than this case, in holding that a financing motive, and even a financing disposal of the money received, will not deprive a transaction of its character as a dealing in the course of business. Such cases, for example, as *The Yorkshire Railway Wagon Co. v. Maclure* (1), and the *Celluloid Case* (2), raised greater difficulties in the way of regarding the transactions as “in the course of business,” than any which we have to meet.

. It is only necessary to refer to one other matter, the distinction between this case and *Ex parte Brydon* (3). It is plain that the

(1) 21 Ch. D. 309. (2) 34 Ch. D. 147. (3) [1896] 1 Ir. R. 301.

debentures have a special preference and priority, by express contract, over any other charge or mortgage. If this were a case of charge or mortgage, and not of sale, the transaction could not be saved from the second clause of the debenture contract. But sale negatives any question of priority, for it is a conversion of property into money, and if any question of priority came in, it would be impossible to acquire priority over the debentures.

Brydon's Case (1) was decided in this Court upon the finding of fact that the Bank of Ireland was throughout a mortgagee, and a mortgagee only, and never bought any whiskey. The Company transferred the whiskey, and purported to sell it, to people whom we held to be only trustees for the Company, holding upon trust to mortgage to the Bank of Ireland, but themselves standing in a fiduciary relation to the Company, which made it impossible for them to claim to be out-and-out purchasers. The whole transaction was a colourable sale, and an evasion, for the real purpose of giving a security to the Bank, leaving an equity of redemption still in the Company. That being the clear distinction between *Brydon's Case* (1) and this, I have thought it right to show that the two decisions are entirely consistent.

I concur with the Lord Chancellor, and I think that the tendency of a decision the other way would be to hamper trading Companies in the course of their legitimate business, by laying a sort of mortmain, in the shape of debentures, upon commercial undertakings, whose life consists in selling their manufactures.

WALKER, L.J.:—

I can add little to the judgments already delivered; but as the case is an important one, and the parties may desire to carry it further, I think it is desirable to state my own views. The conflict is between debenture-holders who held a floating security over the property of this Company and persons who allege that they purchased portion of the stock of the Company in April and May, 1894, some three months before the liquidation took place. The debenture-holders contend that the transactions impeached were not in reality sales but mortgages in disguise, and that the

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sales were not in "course of business of the Company, nor for the purpose of continuing and carrying on the same," and at all events that the title of the alleged buyers is puisne to their debentures.

The memorandum and articles of this Company confer the largest powers for carrying on its business. The powers of the directors whom the managing one represented included the most ample ones for carrying on and managing the business and entering into any contract for the disposal of the property upon such terms as they might deem expedient.

In 1892 the Company, under its borrowing powers, raised a sum of £100,000 on debentures, secured by a trust deed dated the 12th of January, 1892. By it specific freehold property of the Company was conveyed to the trustee upon trust much in the language of the express conditions afterwards set forth. In addition to this specific property the Company, by the debentures, charged with the payment of the principal and interest payable under them its undertaking, and all its property real and personal, both present and future, including its uncalled capital for the time being, and by the terms of the debentures and clause 21 of the deed all the property charged though not conveyed, became subject to the trusts of it. The principal money became payable (a) on default of payment of interest for three months; (b) the winding-up of the Company; (c) the levying of a distress or issuing of an execution, attachment, or sequestration against any of the property; or (d) a breach of some covenant contained or implied in the deed.

The fourth and fifth conditions attached to the debentures are the important ones, and I shall not occupy time by reading them, as they have already been fully stated. Those special conditions are of a class which have become not unusual since the decision in 1885 of *Wheatley v. Silkstone and Haigh Moor Coal Co.* (1), whenever it is desired to exclude the power of creating specific securities even for business purposes in priority to the debentures, and accordingly we find in them not only a prohibition of the power of creating such a security, but also an expression of the

power of what the Company may otherwise, notwithstanding the existence of the debentures, lawfully do till the debentures become a fixed charge.

I think the best mode of dealing with the case is—(a) to consider the legal character of such a mortgage debenture and the powers retained by the Company if the special conditions were not there; and then (b) to consider the construction and effect of those special clauses.

The debentures here are clearly I think a “floating security,” and do not become fixed charges till the event happens on which they are made payable. The character of such a charge has been stated in many cases, of which I may mention *Panama v. New Zealand and Australian Royal Mail Company* (1) as the earliest and *Government Stock and Other Securities Investment Company v. Manila Railway Company* (2) as the last. I think the result may be stated as follows:—

It is involved in such a charge that the Company shall continue a going concern and the debenture-holder has no power to interfere till his charge becomes payable. He can claim no account of mesne profits or challenge any authorized dealing by the Company with its property or business. The directors, as masters, carry on meantime the business for which the Company was incorporated according to its constitution, and remain clothed with the power of doing all things necessary for carrying on that business, including the meeting of special emergencies. Assets may be withdrawn by sale, and the proceeds then takes their place, or other assets may be substituted or additional assets added by trading; but the floating security follows the concern, reduced or added to, through every form of its trading existence, which existence continues as if the debentures were not there till the floating charge became a fixed one. Till then, to use the words of one learned Judge, “the charge is dormant.”

I have already mentioned the origin of those clauses, prohibiting a Company from mortgaging or pledging the assets in priority, and it must be taken that to this extent the going concern can be lawfully deprived of power; but what we have to consider here

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(1) L. R. 5 Ch. 322.

(2) [1897] A. C. 81.

Appeal. is the case of a sale—whether it is a *bona fide* one, and whether it
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I think that though such a prohibition of a mortgage or pledge is valid, the words of prohibition must receive a strict interpretation; and the cases of *Brunton v. Electrical Engineering Company* (1) and *Robson v. Smith* (2), where the question turned on the construction of such clauses, are authorities for that. The conditions attached to the debentures in the case of *Driver v. Broad* (3) were substantially the same as in the present case, yet all the incidents of a floating security are treated as attaching just as if no such special conditions existed. It was—"The Company, until the appointment of a receiver under the provisions herein contained, or the commencement of a winding-up, shall be at liberty, but only in the ordinary course of its business, to sell, deal with, and dispose of the property charged, to give receipts for money, and divide its profits as if none of the said debentures had been issued." Lord Justice Kay says:—"Notwithstanding the existence of the charge on all the property, including the real property of the Company, power is reserved to dispose of the property if in the ordinary course of carrying on the Company's business it becomes necessary to do so." Lord Justice Kay deals with the powers of the Company in the same manner as if no such special clause were amongst the conditions, and I do not think that the existence of such a condition makes against the other powers of the Company, either implied from the character of the security, or to be found in the expression of those powers if such expression do not amount to more.

I shall now consider whether—(a) there was a *bona fide* sale of the whiskey, and (b) whether the transaction was not within both the implied and expressed powers of the Company.

Upon the first question I look to the condition of the Company in April, 1894, the stock it had on hands, and the market for it, its emergencies owing to the failure of the Warehouse Company, the negotiations of Mr. Duffin, the representations of Boyd on the 16th and 17th April at the meetings which took place, the knowledge of all that it was necessary there should be a sale out-and-out,

(1) [1892] 1 Ch. 434. (2) [1895] 2 Ch. 118. (3) [1893] 1 Q. B. 744.

and the determination of the Banks only to deal on this basis, and I think the price stipulated for was not unreasonable. The test is whether the transaction was a device or cloak to conceal a loan. Every one knew what was legally necessary. No doubt it took the form of a sale, because a mortgage of the required priority could not legally be made; but the question is, was the alternative adopted real? One answer of Mr. Boyd, No. 76, was relied on, but I do not think it necessarily bears the meaning attributed to it. If it did it would be inconsistent with his answers 131 and 132. I apply to the transaction the tests put by Lindley, L.J., in *The Yorkshire Railway Wagon Co. v. Maclure* (1), a case much more of the character of a device than the present. Was it a device or cloak to conceal a loan? or a real sale in this sense that the parties intended it to operate according to its tenor? I think in his words, "It was not intended as a mere blind or cloak for something behind; it was a transaction substituted for another, but *bona fide* substituted and intended to be acted upon according to its purport and apparent effect." The payment of the costs of Mr. Brett by the Company and the frame of some items in his bill of costs seem to be material only on the question whether there was a real sale or not.

The mode in which the purchase-money was to be paid, and was paid, remains to be considered, and this point appears to me the only one presenting any difficulty. If the purchase-moneys had been on each occasion paid over to J. S. Boyd to be disbursed by him in his capacity of director, I cannot think there would be any real doubt either as to the reality of the sale or its being in course of business in any sense of those words. It would be quite natural to sell this surplus stock to prevent a crisis.

Here the persons buying had an object in keeping the Company afloat, till at all events it was seen what would become of Mr. Duffin's negotiations. Their fortunes were to some extent united with those of the Company, and Boyd had the same object. Mr. Brett says they wished to take precautions that the purchase-money should be applied only for the absolutely pressing wants of the Distillery Company, and not to the relief of any of the financial

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bills as this would best enable the Company to continue and carry on its business. Accordingly the sales were made on the terms agreed to by sellers and buyers that from time to time Messrs. W. S. Boyd and A. P. Swan should furnish certificates to Mr. Brett of the sums required for the pressing purposes of the Company for its daily business after the application of their daily receipts, and that then Mr. Brett should draw on the Belfast Bank in which the purchase-moneys were lodged, cheques in favour of the Company, and money being thus provided for the Company at their bankers the Company should draw cheques for the amount. In this way £14,053 13s. was paid by cheques of various dates from the 20th April to the 4th July, £5000 going to finish the malting, £2500 to interest on debentures, and the balance to wages and other pressing requirements, and thus the Company was in fact kept going till the 14th August.

Next, if the sales by the Company were real, what is there to show that they were not, "in the course of its business, and for the purpose of continuing and carrying on the same"? These latter words, added in the condition to "in the course of its business" help, I think, to illustrate the meaning of them. I do not think a transaction will be the less "in course of business," because it was exceptional, never occurred before, and might never occur again. The Company was hovering between life and death, and there was no market for its goods. There was an urgent necessity for a sale, and the buyers were determined as to the only terms they would buy on. What was done, though it restricted to some extent the control of the selling directors over the purchase-money, was intended to secure that the Company should be, in the words of the condition, "continued and carried on," and was a prudent provision for attaining the end. We are now judging after the event; but if the Duffin negotiations had proved successful, I cannot imagine a more beneficial act than that which would have kept the Company a going concern till their completion. The meaning of the words "in the course of business," as against debenture-holders, came to be considered in *Willmott v. London Celluloid Company* (1). There mortgage

(1) 31 Ch. D. 425; on appeal, 34 Ch. D. 147.

debentures had been granted, and one of the conditions endorsed on them was, "that the charge created by the debentures should be a floating security, and that accordingly the Company might in the course of its business deal with and dispose of the property charged in such manner as the Company might think fit."

Bayly and Hanbury, two directors, had advanced moneys to the Company, and in September, 1884, a fire occurred at the Company's works, for which the Insurance Company admitted liability to £3000 shortly after the fire. Bayly and Hanbury (two directors being a quorum) held a meeting, and passed a resolution to commence actions against the Company to recover their advances, and instruct a solicitor to consent to judgment. This took place, and then they attached by garnishee orders the £3000 due by the Insurance Company for their own debt. The Company was then in an insolvent condition. The plaintiff, who was the holder of mortgage debentures, brought an action claiming to have the £3000 repaid and the usual relief in the mortgagor's suit. A petition to wind up was presented two days after the issue of the writ. It was held the plaintiff was not entitled to rely on any doctrine of fraudulent preference. The case on appeal is reported in 34 Ch. Div. p. 147, and there the principal argument was that the transaction was not a dealing by the Company in the course of its business, within the meaning of the condition, and it was shown that at its date the Company was hopelessly insolvent. The Court did not express any opinion as to the conduct of the two directors, but they held that as the business of the Company had not actually stopped at the date of the transaction, it was going on, and therefore the transaction had taken place in the course of the business of the Company, and that apparently though the transaction might at the instance of all the creditors be impeached on the ground of fraudulent preference, and though the persons who got payment for themselves were directors owing a duty to the Company; therefore, for the purpose of putting a construction on the words "course of business," considerations applicable to the position of the persons who did the act, and its possible illegality under other aspects, were disregarded—the concern being actually a going one.

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In the case of *Hubbuck v. Helms* (1) the transaction was held not to be in the course of business, because on the facts the Company had ceased to be a going concern, and therefore the rights of debenture-holders then arose. The same test was applied in both the cases I have mentioned, but owing to the facts with a different result.

The cases of *Taylor v. McKeand* (2) and *Payne v. Fern* (3) which were relied upon for the respondents, arose between grantors and grantees of goods and stock in trade under bills of sale which vested the property absolutely in the grantees, and in each case the jury found that the impeached sales were not in the ordinary course of business, and in the first that the sale was fraudulent. On the findings of the jury the right of the plaintiff to the goods in each case arose.

I am of opinion that once the conclusion is arrived at that the sale was *bona fide* the question before us is solved. It is not contended that the debentures became by force of the transaction a fixed charge as distinct from a floating one, and it is not impeached as fraudulent or illegal. The Company continued a going concern, and other assets took the place of the sold ones, and those other assets might again have been sold, the floating security following them.

Whether we look to the powers of the directors as implied from the nature of the security or the expression of the reserved powers in the condition, I think the transaction real and valid; and I agree that the appeal should be allowed.

Solicitors for the appellants: *L'Estrange & Brett.*

Solicitor for the liquidator: *D. F. Spiller.*

Solicitors for the debenture-holders: *Crawford & Lockhart.*

R. D. M.

(1) 56 L. J. Ch. 537. (2) 5 C. P. D. 358. (3) 6 Q. B. D. 620.

IN RE RYAN, DECEASED.

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Assets—Executors de son tort—Joint and several liability—Principal and agent—Unauthorized dealing with assets—Necessary payments—Credits.

The liability of one executor *de son tort* for the acts of another executor *de son tort* is not limited to the extent to which there has been an actual personal receipt of goods or money by the first-named wrongful executor; but one executor *de son tort* may be liable for the acts of another when such acts have been authorised and directed by him.

Circumstances under which disbursements made in connexion with testator's assets by a wrongful executor have been allowed credit for.

FURTHER CONSIDERATION.

The action was brought by the plaintiff, as administrator with the will annexed of Daniel Ryan, for the execution of the trusts of the will and the administration of the personal estate of the deceased.

The facts of the case material for the purposes of this report are as follows :—

Daniel Ryan died November 14th, 1888, and at the date of his death was in possession of various farms of land (principally grazing farms), and a number of cattle, sheep, and other stock. The defendant James Ryan was the eldest brother of the deceased and was named as executor in his will. He did not take out probate but acted as if he were rightful executor in the management of the assets, taking possession of some of them himself, while some of them were realized under his directions by the defendant John Ryan, a nephew of the deceased, and a legatee under his will. Prior to the death of Daniel, John Ryan had acted as his manager and stockmaster, and had received a salary as such; and after his death he continued, under the directions of James as to sales of stock, payment of rents, and other disbursements, to act as manager, and an arrangement was made that he should receive

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a salary for so doing. Payments in respect of the assets received by John were accounted for to James, and under these circumstances the two acted together in the disposal of the assets.

By judgment, dated 29th October, 1891, it was ordered that the trusts of the will of Daniel Ryan should be carried into execution, and that the personal estate should be administered and accounts and inquiries taken. By his certificate, dated the 16th December, 1896, the Chief Clerk found that there was a balance due to the estate by John Ryan of £3875 15s. 7d. John Ryan became insolvent in 1895. The plaintiff contended that James Ryan was responsible for the balance found to be due by John, and that question was reserved for the decision of the Court on further consideration.

It was proved before the Court that the malversations of John Ryan in reference to the assets were subsequent to a receipt by him of assets which he received by the directions of James Ryan.

The certificate of the Chief Clerk found that there was a balance due to the estate on the part of James Ryan of the sum of £677 6s. 2d. On the hearing on further consideration he claimed to be allowed credit for two payments made by him in connexion with the estate and disallowed by the Chief Clerk. The circumstances of the first disbursement claimed were as follows:—Testator for some years previous to his death held the grazing of the lands of Claremadden, under an agreement of letting in which James Ryan was joined as surety for the payment of the rent. It was provided in the agreement that the farm might be surrendered in the May of any year, provided notice of such intention was given to the landlord in the previous October. At the date of the death of Daniel Ryan in November, 1888, no notice of surrender had been given, and arrears of rent were due. The farm, which was being worked at a loss, was surrendered to the landlord in May, 1890, in accordance with notice of surrender given by James Ryan in October, 1889. The rent which accrued due November 1st, 1889, and May 1st, 1890, and the poor rates, were paid by James Ryan, and were disallowed by the Chief Clerk. He now claimed to be allowed credit for these payments of rent and poor rates.

James Ryan also claimed to be allowed credit for a sum of

£80, paid by him for rape, and supplied for the purpose of feeding certain sheep of the testator, of which he (James) had taken possession. It was proved that the rape was used in feeding the sheep and was at the time necessary for their sustenance. They were afterwards handed over to the receiver appointed by the Court, and were sold by him for the benefit of the estate of the deceased.

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The Solicitor-General (with him, *Meredith, Q.C.*, and *D. F. Browne*), for the plaintiff:—

The payments made by James Ryan in respect of the rent and poor rate of the farm of Claremadden and the rape supplied to the sheep of the testator were rightly disallowed by the Chief Clerk.

The plaintiff is entitled to charge James Ryan and John Ryan severally and jointly with any sums of money found to be due by either of them. They took possession of the estate and played into each other's hands. John was to get a salary and James was to receive the payments made in respect of the assets, although he refused to take out probate. The facts show that John was James' agent. The agency is really a question of fact; and, that being proved, James is liable. It is not necessary that he should have personally received the assets in order to render himself liable in respect of such assets.

Price, Q.C. (with him *Matheson, Q.C.*, and *J. H. Shaw*), for the defendant James Ryan:—

James Ryan was a surety for the testator for payment of the rent of Claremadden, and was personally liable for the rent. The farm of Claremadden could not have been given up under the agreement by which the farm was held before May 1st, 1890, and the payment of the rent and poor rate was therefore a proper payment by James Ryan, and should have been allowed to him.

The payment for rape was necessary as the feeding was required to save the lives of the sheep. James Ryan got no benefit whatever from it. The sheep which were kept alive by this feeding were afterwards handed over to the receiver, and were sold, and the estate of the testator got the benefit. James Ryan having been an executor *de son tort* was in the position of a constructive trustee. Such a trustee is entitled to be allowed for outlay of

M. R. which the trust property has got the benefit: *Stratton v.*
 1897. *Murphy* (1); *Griffin v. Griffin* (2).

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James Ryan should not be made responsible for the balance found to be due by John Ryan. It should not be held that John was the agent of James; James Ryan as executor *de son tort* could not appoint an agent: *Sharland v. Mildon* (3); Williams on Executors (9th edition), p. 1736. In *Lowry v. Fulton* (4) an executor who acted but never proved, was held liable only for what he received himself. James Ryan had no control over John, and could not make him account. John could not have settled accounts with James but only with a properly constituted personal representative: see note at p. 216 of Williams on Executors, citing *Carmichael v. Carmichael* (5), and *Hill v. Curtis* (6).

Meredith, Q.C., in reply:—

Sharland v. Mildon (3) does not apply. It does not decide that in a case where an executor *de son tort* directs the acts of another wrongful executor he cannot be responsible for the malversations of the latter. Both are responsible, but the principal is responsible also for the acts of his agent.

Counsel also cited *Doyle v. Blake* (7).

THE MASTER OF THE ROLLS:—

Having regard to the peculiar position in which James Ryan stood towards the estate of the testator by reason of his being surety for the rent of Claremadden, he was entitled and indeed could have been compelled to pay the rent of it; and on doing so would have a claim to be recouped in course of administration. I must take it, too, that he could not get rid of that farm by surrendering it before he did; and I do not see my way to disallow his claim in that respect.

As to the £80 claimed in respect of rape provided for the sheep of testator after his death, I am satisfied that the money was

(1) Ir. R. 1 Eq. 345, 361.

(2) 1 Sch. & Lef. 352.

(3) 5 Ha. 469.

(4) 9 Sim. 104, 123.

(5) 2 Phill. C. C. 103.

(6) L. R. 1 Eq. 90-98.

(7) 2 Sch. & Lef. 231.

actually expended for the purpose and with the result of keeping them alive; and that whoever had them in charge must have spent that money in the same way. The money went into the sheep as food and came back to the estate as part of the price realized, and with which the defendant James Ryan is charged in account. Although this defendant was executor *de son tort* I cannot think that when once he had placed himself in that position by taking possession of the sheep it was his duty to allow them to starve, or that he was not entitled to deduct from the price when sold this salvage payment. I shall allow him credit for this £80 also.

But the larger question remains as to the liability of James Ryan for the receipts of John under the circumstances proved in the case.

Of course, an executor *de son tort* is only answerable for the assets which he receives; and if there are two, or for that matter any number of tortious executors, each is only liable for the property of which he has possessed himself. Nor can such an executor be liable for not realizing more assets, or for merely standing by while the assets are made away with or wasted by others. This arises from the necessity of the situation; for an executor *de son tort* has no legal title, save such as is forced upon him by a sort of estoppel, and cannot sue to recover assets, nor restrain another person whose title is as good, or as bad, as his own. This is elementary law; and is relied on here as a conclusive answer to the claim of the plaintiff, as lawful personal representative, to hold James liable for the receipts of John and (*e converso*) John for those of James. The latter contention is not of much moment; for John is wholly insolvent. The former, however, is an important one in all its bearings, and must be so examined. It is open under the prayer of the statement of claim and also under the decree.

Obviously the question is whether, under the circumstances proved, the receipt of the assets by John must be treated as being their receipt by James also, for the purpose of the rule in question: for, if not, James would not be accountable further than for his own balance as found in the certificate of the Chief Clerk.

Both James and John Ryan were summoned up for cross-examination before me. I heard them both, though at the time

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the case had not been opened before me, and doubtless the exact points in controversy were not so fully developed as they afterwards were. However, I formed a clear opinion that James, who was named as executor in the will, though he did not prove, acted from the first as if he were a rightful executor, purporting to manage and control the whole estate, and doing so neither as one of the next-of-kin (which he was), nor as a sort of *père de famille* (which he appears to have considered himself), nor as a surety merely for the rent of one of the farms (as he was), but as an executor, whose acts would all be natural and proper, if otherwise right, so soon as he took out probate, as he ought to have done. Some of the assets he took possession of himself. Some he realized through John, who accounted to him for the proceeds. The rest he managed through John and the deceased nephew Owen, giving them directions (he called it "advice") as to sales and payments, on the terms that John should be paid out of the assets for management a salary of considerable amount (about £1000 in all), just as he had been paid by deceased for similar service. The payments or recoupments he received through John were to his knowledge portions of the assets: and I thoroughly believe that his evidence on this part of the case was unreliable, so far as it conflicted with that of John, whose testimony was very clear and convincing. The inference of fact, of which the evidence satisfied me, and as to which I have no doubt at all, is that James and John acted in concert in the disposal of the estate; that James was the principal and John the agent; that what John received and did was received and done for and by the authority of James; and that John's malversations were subsequent to the receipt by him of assets which he received by direction of James.

But the case of James Ryan was mainly rested upon a view of the law which assumes these facts. His counsel contended that as James and John were both wrongdoers there can be no liability on the part of the one for the acts of the other, except to the extent to which there has been an actual personal receipt of goods or money by the person to be charged: there can be no agency and no accountability. So far was this pressed, that when I asked: "Supposing James had given John a power of attorney under seal, authorizing him and directing him to take

the sheep off one of the farms and sell them; and if John, acting under it, took away the sheep and sold them, but kept the proceeds in defiance or in fraud of James, would James be under no responsibility to the rightful representative when raised?" I was told no; certainly not; James is executor *de son tort*, and only answerable for what he received.

I put it another way. Supposing James and John arranged to sell the sheep and went to the farm together, and James stood outside, sending John in with the dog, and John accordingly took away the sheep; James (it was said), unless he himself drove them away or received the proceeds of their sale (and then only to the extent that he did so), would be irresponsible.

These were very startling propositions; and but for the fact that they were put forward with great appearance of earnestness, and at considerable length by Mr. Price, I do not think I should have regarded them as serious.

The acts indicated would, of course, have been sufficient to attach responsibility to the principal in any action founded on contract. They would have attached criminal responsibility in a case where the act authorized was charged as a crime. But as they were *torts* there can be no agency! If so, ninety-nine out of one hundred actions of assault, false imprisonment, or malicious prosecution, or negligence, for instance, and not to go further, have been wrongly decided.

A case was cited as an authority for the proposition, viz. *Sharland v. Mildon* (1), and see Williams on Executors, pages 219, 220.

But the cases decide no such proposition as that in the case of executors *de son tort* one cannot be liable for the acts of another, authorized and directed by him. They only show that both principal and agent are responsible, and that the agent cannot escape responsibility by showing that he is only an agent, on the principle of *respondeat superior*. This is so evident that it needs no further illustration.

I am of opinion, both on the facts and on the law, that James Ryan is liable for the balance due by John; but as his counsel

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M. R. state that he had not an opportunity of attending, or at any rate
 1897. did not attend, on the taking of the account against the latter
 KENNY v. in Chambers, there will be a further reference on that part of the
 RYAN. case, if it is so desired.

Solicitor for the plaintiff: *D. Purcell.*

Solicitors for the defendant James Ryan: *Longfield, Kelly, & Armstrong.*

R. W. L.

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IN RE GALVIN, A BANKRUPT (1).

March 9. *Bankruptcy—Crown debt—Legacy duty—Priority—Prerogative—Practice—*
 June 4, 27. *Costs against the Crown—18 & 19 Vict. c. 90, s. 2.*

A, who was executor of a deceased person, received and applied for his own use assets of the deceased without paying to the Crown legacy duty payable in respect of certain legacies which there had been assets sufficient to meet. A was subsequently adjudicated a bankrupt, and his assignees in bankruptcy realized his estate:—

Held, that the Crown debt for legacy duty was entitled to priority over the general creditors of the bankrupt; and (reversing the decision of Boyd, J.) that such priority could be asserted by motion in the bankruptcy matter, and existed notwithstanding the vesting of the bankrupt's estate in his assignees.

Held, by Boyd, J., that costs cannot be given against the Crown where the Attorney-General is not a party *eo nomine*.

Reg. v. Beadle (7 E. & B. 492) followed in preference to *Ex parte Jordan* (31 L. R. Ir. 1).

APPEAL from the order of Boyd, J., dated the 29th February, 1896, refusing priority in payment of legacy duty of the Crown.

The bankrupt was solicitor to Martha Crawford, a person living in Belfast possessed of considerable means. By her will, dated the 9th April, 1894, Martha Crawford left some pecuniary legacies, bequeathed one annuity of £15 a-year to Maria Stirling, and appointed the bankrupt executor. There was no disposition

(1) Before LORD ASHBOURNE, C., PALLES, C.B., and FITZGIBBON and WALKER, L. JJ.

of the residue. She died on the 26th April, 1894, and on the 16th May probate was granted to the bankrupt. On the 9th May he lodged his account, which showed assets to the extent of £10,272 12s. 5d., the debts were £32 10s. 6d., leaving a net balance of £10,240 1s. 11d., to which her next-of-kin were entitled after purchase of an annuity for Maria Stirling. The assets were invested in £400 Great Northern Stock, £2000 Belfast and Northern Counties Preference Stock, and some shares in the Belfast Bank, and there was £3304 on deposit receipt. Proceedings were commenced by the next-of-kin against the bankrupt to administer the assets in *Sayers v. Galvin*, and on the 23rd January, 1896, an order to administer was pronounced by the Vice-Chancellor. On the 23rd March a further order was made that the bankrupt should lodge in Court the money in his possession belonging to the estate. He failed to obey the order, and was attached for disobedience. On the 17th March, 1896, Galvin was adjudicated bankrupt, and from evidence taken in the Court of Bankruptcy, it appeared that Galvin had lost Miss Crawford's money to the extent of £9500 by speculation on the Stock Exchange.

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A claim was made by the Inland Revenue for payment of legacy duty as a preferential payment in priority to the general creditors, and this application was refused by Boyd, J., on the 29th February, 1896 (1), and the Inland Revenue appealed.

(1) The following is the judgment of Boyd, J., delivered January 15th, 1897:—

In this case an application has been made to me, on behalf of the Crown, for payment, out of the estate realized by the assignees of the bankrupt, of moneys alleged to be due by the bankrupt as executor of the will of Martha Crawford in respect of legacy duty on the amount of her estate and effects.

The motion before me is grounded on an affidavit made by Mr. Wm. Haine Maunder, principal clerk of the legacy and succession duty department of the Inland Revenue, Custom House, Dublin, on the 2nd December, 1896. In this affidavit it is stated that from the books of the said department it appears that probate of the will of the said Martha Crawford was granted to the bankrupt on the 16th May, 1894, and that, as appears by the schedule of assets sworn by the said M. A. Galvin as such executor, for the purpose of obtaining probate of the said will, the estate and effects of which the said testator died possessed,

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Serjeant Jellett, Q.C., and C. E. M'Dermott, for the Commissioners of Inland Revenue:—

The section under which the claim of the Crown attaches is sect. 37 of 5 & 6 Vict. c. 82. The way in which the duty was levied up to 36 Geo. 3, c. 52 (Eng.), which corresponded with 54 Geo. 3, c. 92 (Ir.), was that legacy duty was always paid in form of a stamp duty on the receipt. The inconvenience of that course was pointed out by Heath, J., in *Green v. Croft* (1).

The duty is regulated by sect. 37 of 5 & 6 Vict. c. 82, which provided that legacy duty was to be paid by executors or administrators on retaining or paying legacies, and if the duty was not paid, it remained a debt due by the executor to the Crown.

amounted to the sum of £10,240 1s. 11d., and that the bankrupt as such executor, has not delivered to the Commissioner of Inland Revenue an account of said personal estate and effects, and paid the legacy duty thereon, as required by law. The said affidavit of the said Mr. Maunder further alleges that the next-of-kin of the deceased (who, under her said will, became entitled to her estate) appear from the proceedings in the Court of Chancery in the action of *Sayers v. Galvin* to be descendants of brothers and sisters of the testatrix, and are chargeable with legacy duty at the rate of 5 per cent., and that the sum payable for legacy duty would presumably amount to more than £500, but that £500 will be accepted in satisfaction thereof.

The affidavit finally alleges that the said legacy duty and interest is a debt due to Her Majesty, and payable to the said Commissioners of Inland Revenue out of the assets of the bankrupt, which are now or may be under the control of this Court.

I may, in passing, observe that the evidence of the alleged facts on which this motion is grounded is most unsatisfactory and vague, and is not, in my opinion, sufficient to entitle the applicant to the order sought by the notice of motion. I, however, desire to decide this case, not upon any technical grounds, but on what I conceive to be the law applicable to the case had the evidence been satisfactory.

It is quite clear that the provisions in the Bankruptcy Act, giving priority to certain Crown debts do not take away any rights of the Crown to priority in respect of other debts to which it is entitled to payment. There is also no doubt that legacy duty is a debt due to the Crown, and that such duty becomes payable upon the retainer by the executor of assets of his testator for his own or others' benefit.

In the present case it is stated the bankrupt fraudulently made away with

In this case there was receipt of the money, the debts were paid, the probate duty was paid, and then the legacy duty attaches.

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A debt created by a statute is a specialty debt: *Cork and Bandon Railway Company v. Goode* (1). The Crown is not bound to proceed by extent; although it has prerogative rights to proceed in a particular way, it may waive its rights and proceed as a creditor: *Chitty on Prerogative*, page 245.

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The sections of the Irish Bankruptcy Act, 1872, are taken from the English Act of 1869, sects. 32 and 49. By sect. 32 of the English Act, certain debts are to be paid in priority. Parochial or local rates, assessed taxes, property or income tax not exceeding one year's assessment, and the wages or salary of a

all the estate and effects of his testatrix which came to his hands, and that none of the legatees received any portion whatsoever. How much he received has not been shown. It has been argued on behalf of the assignees of the bankrupt that legacy duty under the statute only becomes payable upon a retainer of assets by the executor for the benefit of the legatees, and that, as the legatees never received any portion of their legacies, there was no retainer by the bankrupt for their benefit, and no legacy duty is payable. On behalf of the applicant it has been contended that the bankrupt having received the estate, he retained it for his own benefit, and therefore, under the statute, his assets are liable to the payment of the legacy duty. With neither of these contentions can I agree. In my opinion, whatever money the bankrupt received he so received on behalf of, and for the benefit of, the legatees. He had no legal right to receive it for his own benefit, though he so misapplied it. The statute, I think, only applies to a legal and authorised receipt for his own benefit. As executor he was legally bound to pay the legacy duty, and to deduct it from the respective legacies. Had he paid the legacies without deducting the duty he would still remain liable to it, but the legatees would be liable to reimburse the executor any duty which the latter may subsequently be compelled by the Crown to pay. On the other hand, he as executor was the only person entitled to receive the money, not for his own benefit, but for the benefit of the parties legally entitled to it, subject to legal deductions, including legacy duty. He therefore received it for their benefit, though he did not so apply it.

The real point in the case is whether, in the circumstances which have happened, the Crown is entitled to the money in Court, which has been realised, not by the bankrupt, but by his assignees.

Prior to the bankruptcy, and the transfer of the bankrupt's property to his

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clerk or servant. Sect. 49 provides that an order of discharge shall not release the bankrupt from debts due to the Crown. Sects. 49 and 58 of the Irish Bankruptcy Act of 1872 correspond with these two sections. The English Act provides that "save as aforesaid" all debts shall be paid *pari passu*. These words are not in the Irish Act.

The analogy of the Joint Stock Companies Acts and the Bankruptcy Act is remarkable. Up to 1883 the codes ran parallel with each other, but sect. 150 of the Bankruptcy Act of 1883 put an end to the priority of the Crown in England. In 1889 the Preferential Payments Act was passed for Ireland (52 & 53 Vict. c. 60), and by sect. 4 it was enacted that in the distribution of the

assignees, the Crown had taken no steps to enforce its claim. Even to the present time the Crown has not taken any such proceedings. No extent has been applied for, or other proceedings taken to enforce the claim. Extent binds that which is legally or equitably the property of the Crown debtor down to the time when the writ is issued or proceedings commenced to enforce the claim (*Giles v. Grover*, 1 Cl. & F. 72); but if the debtor has alienated or charged his property before that time, the right of the Crown is defeated (*Attorney-General v. Capell*, 2 Shower, 480; *Rex v. Cotton*, 1 Parker, 112; *Attorney-General v. Leonard*, 38 Ch. D. 622). The question therefore is whether the property remained vested in the debtor when the Crown commenced proceedings (*Ex parte Postmaster-General*; *In re Bonham*, 10 Ch. D. 595). In the last-mentioned case the property remained vested in the debtor, and therefore the Crown was held entitled to recover; but it was admitted by the Solicitor-General, in his argument on behalf of the Crown, that the rights of the Crown would have been defeated had the property legally passed out of the debtor. In the very able judgment of Judge Miller in *The Matter of Timothy Corley* (23 L. R. Ir. 249) the same principle was laid down.

In the present case no suit has been commenced by the Crown, or process awarded, no debt has been recorded by the Crown, and no steps have been taken as required by law, even down to the present time, to assert its rights: see 21 & 22 Geo. 3, c. 20, s. 4. The property had passed out of the bankrupt into his assignees, and been realised by them long prior even to the present application. I have been referred to an order of Judge Miller in an unreported case of *Stephens, a Bankrupt*, but, except the affidavit on which the motion in that case was grounded, none of the facts of that case are before me, and I cannot act upon it in opposition to the other decisions to which I have referred.

I am therefore of opinion that the present application must be refused with costs.

property of a bankrupt certain debts should be paid first. The debts are the same as those mentioned in the English Bankruptcy Act.

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In *Re Henley & Co.* (1) the Inland Revenue Commissioners were held entitled to payment in full of property tax, the Crown waiving its prerogative right. In *Re Bonham, Ex parte the Postmaster-General* (2), it was held that though the Crown is named in some of the sections of the Bankruptcy Act, 1869, it is not bound by the other provisions of the Act. In *The Oriental Bank Corporation, Ex parte the Crown* (3), it was held that the provisions of the Bankruptcy Act, 1883, which took away the priority of the Crown, have not, under the Judicature

The question having been raised whether there was jurisdiction to award costs against the Crown, this point was argued (January 29th, 1897).

Blood, for the assignees, relied on 18 & 19 Vict. c. 90, s. 2; *In re Dublin, Wicklow, and Wexford Railway Co.*; *Ex parte Jordan* (31 L. R. Ir. 1).

C. E. McDermott, for the Commissioners of Inland Revenue, contended that the statute only applied to cases in which the Attorney-General sued on behalf of the Crown: *Reg. v. Beadle* (7 E. & B. 492), not cited in *In re Dublin, Wicklow, and Wexford Railway Co.*; *Ex parte Jordan*.

BOYD, J. :—

I certainly think that it is an uncommonly hard thing that if a department of the Crown think fit to institute a motion to take away all the benefits which have accrued by the activity of other creditors, and ask for costs against the estate, and fail, they should not be liable to pay costs. But in the case of *Reg. v. Beadle* (7 E. & B. 492) the point was expressly raised, and I cannot go in the face of that decision. It does not appear that the point was raised before the Vice-Chancellor in the case cited (*Ex parte Jordan*, 31 L. R. Ir. 1). If it had been, I certainly would, in deference to his opinion, to which I attach so much weight, have followed his decision. But the point was expressly raised in the English case. I must decide that costs cannot be given except where the Attorney-General is a party *eo nomine*.

On the application of Mr. Blood, his Lordship gave the assignees their costs out of the estate.

W. G.

(1) 9 Ch. D. 469.

(2) 10 Ch. D. 595.

(3) 28 Ch. D. 643.

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Act, been incorporated into the Companies Acts. The motion in that case was similar to this, and the net result of the whole argument is—(a) The bankrupt became a debtor to the Crown either by specialty or simple contract under sect. 37 of 5 & 6 Vict. c. 82; (b) the Crown may adopt any remedy it likes and may waive its prerogative; (c) that priority continued down to 1883 in England, when it was taken away, but it remained in this country the same as before.

In *Attorney-General v. Leonard* (1) it was held that in the case of a distress the Crown was entitled to priority, and that it was not limited to proceedings by writ of extent. There are two Irish cases, *Re Corley* (2), where it was held that the Crown was entitled to be paid in priority for breaches of condition in a Crown bond, and that the Crown was not limited to proceedings by writ of extent. The other case is *In re Stevens* (3), decided by Millar, J., on the 29th April, 1890. In both these cases it was decided that the Crown had a right to intervene by motion.

Ronan, Q.C., and A. F. Blood, for the assignees:—

The question is whether an ordinary Crown debt is entitled to priority in bankruptcy or not. The cases are divisible into two classes: (1), where the Crown has made a claim, not through the assignees, but against the assignees: and (2), where it claims through them.

The Crown is entitled to be paid as long as the property is there, but if distributed it cannot be paid. Section 267 of the Irish Bankruptcy Act of 1857 is the vesting section as to personal estate, and a party claiming through the assignees must claim through that section. *Bonham's Case* (4) was the case of a liquidation, and the Crown there claimed against the assignee; the Crown claimed to have a title antecedent to the assignee himself. But there are two wide differences between the Companies Acts and the Bankruptcy Act; (1), there is no *cessio bonorum* in the Companies Acts, the property is in the Company; and (2), in the Companies Acts the Crown is not mentioned. There is no clause

(1) 38 Ch. D. 622.

(2) 23 L. R. Ir. 249.

(3) Unreported.

(4) 10 Ch. D. 595.

in the Irish Bankruptcy Act providing for equal distribution of all the property of a Company among its creditors. Section 32 of the English Bankruptcy Act provides, "subject as aforesaid all debts shall be paid *pari passu*." *Bonham's Case* (1) would have been a purely academic discussion if the right of the Crown to be paid in full rested on an extent. In *Corley's Case* (2) there was a writ of *scire facias* prior to the adjudication. Once you find priority given to one Crown debt, such as income tax, along with other individual debts, the inference is that the other Crown debts are excluded from priority. There is no case at all where the Crown came in by motion and asked to be paid legacy duty in priority. In the case of income tax the practice of the assignees is to pay for one year. There is no suggestion of any such practice as payment to the Crown in priority. The Crown is not mentioned save in one section—sect. 49, and not having been mentioned is not bound. The Crown then only has the right to come in and get a dividend.

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The judgment of the Court of Appeal (consisting of Lord Ashbourne, C., The Lord Chief Baron, and Fitz Gibbon, and Walker, L.JJ.) was delivered by—

THE LORD CHIEF BARON :—

This appeal involves the determination of the priority in the administration of a bankrupt's estate, of debts due by him to the Crown. It is brought from an order of Judge Boyd, by which he refused the application of the Commissioners of Inland Revenue for payment, out of the funds realised by the assignees, in priority to the general creditors, of a debt due to the Crown for legacy duty. In his judgment, however, the learned Judge says that "It is quite clear that the provisions in the Bankruptcy Act giving priority to certain Crown debts do not take away any right of the Crown to priority for other debts of which it is entitled to payment."

June 29.

If the learned Judge be correct in this statement of the law, his decision cannot in my opinion stand; because it is, I venture

(1) 10 Ch. D. 595.

(2) 23 L. R. Ir. 241.

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to think, settled law that the prerogative which prefers a debt due to the Crown, to that of a subject is not limited to cases in which execution is issued, but extends to every case in which the claims of the Crown and a subject, enter into competition. In *The King v. Wells* (1), Macdonald, C.B., says:—"This latter prerogative will be found to depend upon another principle perfectly distinct from this and far more general; determining a preference in favour of the Crown in all cases, and touching all rights of what kind soever, where the Crown's and the subject's rights concur and so come into competition. I take it to be an incontrovertible rule of law that, where the King's and the subject's rights concur, the King's shall be preferred. The books are full of instances to that effect. A great number are cited in *The Attorney-General v. Andrew* (2), and among them *Stringfellow's Case* (3), which is the case of an execution; but there is a multitude of other cases which have nothing to do with executions."

This principle was recognised and applied by the Court of Appeal in England in *Re Henley & Company* (4)—a winding-up case under the Act of 1882—to property tax, which had accrued due to the Crown before the commencement of the winding up. Two matters were decided there: 1, that the Winding Up Act did not bind the Crown, and consequently that the prerogative was unaffected by the provision of the 133rd sect. that "the property of the Company shall be applied in satisfaction of its liabilities *pari passu*"; and, 2, that as the property of the Company was being administered by the Court, the debt to the Crown should be paid in its proper priority. The decision upon the second point is the one which is material here. In reference to it, James, L.J., says: "But if the matter is treated as a matter solely of administration of assets under the direction of the Court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record, or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid." The present Master of

(1) 16 East, 282.

(2) Hard. 24.

(3) Dyer, 67 b.

(4) 9 Ch. D. 469.

the Rolls, Lord Esher, then Lord Justice, says :—" But suppose we regard it merely as a simple contract debt, then, in the administration of the assets of the Company, the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that, in competition with subjects, the Crown must prevail." Cotton, L.J., adds : " But if the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding up, there is still the right which the Crown has when in competition with other creditors of being paid in priority."

To the same effect are *The Oriental Bank Corporation, Ex parte The Crown* (1), and *Attorney-General v. Leonard* (2).

If, then, Judge Boyd is right in the assumption upon which his judgment proceeds, his order cannot stand. The respondent, however, disputes that assumption, and insists that the effect of the provisions of the Bankruptcy Act, which in terms give priority to particular Crown debts, is to abrogate the Crown's priority in respect of its other debts. Thus the real question for our decision is whether the prerogative priority continues, notwithstanding the Bankruptcy statutes, in relation to a debt for legacy duty. It was not, and could not have been, argued that any of our Bankruptcy Acts, prior to that of 1872, abridged this prerogative ; and the enactments which, it is insisted, have that effect, are sect. 49 of the Bankruptcy (Ireland) Act, 1872 (35 & 36 Vict. c. 58), and section 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60).

By sect. 49 of the first Act it is enacted " That all parochial or local rates due from any bankrupt or arranging debtor, at the date of the order of adjudication or of the filing of the petition, as the case may be, and having become due and payable within twelve months next before such times, respectively, and *all property or income tax* assessed on any bankrupt or arranging debtor up to the 5th day of April next before the date of the order of adjudication or of the filing of the petition, as the case may be, shall be paid in priority to all other debts. Between themselves, such debts shall rank equally and shall be paid in full, unless the property of

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(1) 28 Ch. D. 643.

(3) 38 Ch. D. 624.

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the bankrupt or arranging debtor is insufficient to meet them, in which case they shall abate in equal proportions between themselves." Section 58 enacts that the certificate of conformity shall not release the bankrupt from, *inter alia*, debts due to the Crown.

Section 4 of the second Act is to the same effect in principle, but it brings into the class of preferred debts certain wages and salaries which it is unnecessary to specify in detail; and in substance sub-section 1 of that section enacts that in the distribution of the property of a bankrupt, and in the distribution of the assets of a Company wound up under the Act of 1862, the parochial or local rates, wages and salaries therein specified, and all property or income tax assessed on the bankrupt or the Company up to the 5th April next before the date of the order of adjudication, or of the winding up, as the case may be, but not exceeding in the whole one year's assessment, shall be paid in priority to all other debts. Sub-sect. 2 of the same section enacts that "the foregoing debts shall rank equally between themselves, and shall be paid in full, unless the property of the bankrupt, or the assets of the Company, as the case may be, is or are insufficient to meet them, in which case they shall abate in equal proportions between themselves."

Neither of these sections purports to deal with the priority *inter se*, of debts not specifically mentioned in them. Neither of them purports to affect the priority of a Crown debt, not being for property or income tax, over a debt due to a subject, other than a debt for rates, wages, or salaries.

It seems quite clear that "debts," in the expression in sect. 49 of the first Act, "in priority to all other debts," and in the same expression in sect. 4 of the second Act, includes debts due to the Crown; and that the effect of these enactments is—(1) to extinguish the prerogative priority for Crown debts, other than the specified portion of property or income tax, over debts due to subjects in respect of such rates, wages, and salaries as are specified in those sections respectively; and (2) to raise the rates, wages, and salaries to the same level as the specified portion of property or income tax, and to place them and it in priority to *all* other debts, including Crown debts. But in my opinion the

prerogative priority over the debts of subjects, other than those for rates, wages, and salaries, is not affected. Such a prerogative cannot be affected by implication. To have such an effect the words must clearly evidence the intention; and in my opinion the words used are wholly insufficient to do so. Suppose the debts to which the statute gives the artificial priority had not included income tax or property tax, and that the enactment had commenced with the words, "there shall be paid in priority to any debts, whether due to the Crown or a subject;" and then followed an enumeration of the taxes, wages, and salaries intended to be preferred, the only effect of those words would be to lift the specified debts out of their existing rank, which was *puisse* to that of Crown debts, and to leave unaffected the relative priorities of Crown and subject in relation to the unspecified debts. Upon that supposition the order of payment would be:—(1) The specified rates, wages, and salaries; (2) Crown debts; (3) Debts due to subjects, other than those specified in (1).

But the only intention indicated by the inclusion, in the preferred class, of the one specified debt due to the Crown is that whilst the prerogative priority of all Crown debts is displaced, one excepted Crown debt is to have the same statutable priority as that of the other specified preferred debts. This provision, however, affects only the priority of classes (1) and (2), *inter se*, and leaves untouched the priority, *inter se*, of classes (2) and (3). The enactments, in my opinion, have no greater operation upon the prerogative than if all Crown debts had been postponed to the specified rates, wages, and salaries; and this, I have shown, would be insufficient to support the decision appealed from.

We have been much pressed by Mr. Ronan with some expressions of Jessel, M. R., and James, L. J., in *Re Bonham* (1). There the question was as to the priority of an extent which had been issued by the Crown between the filing of a bankruptcy petition and the appointment of the trustee. If the vesting of the bankrupt's estate in that case in the trustee had its common law priority, as distinguished from its relation back under the Bankruptcy Act, the extent would have taken priority; and the question was

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(1) 10 Ch. D. 595.

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whether the Bankruptcy Act, so far as it provided that the vesting in the trustee should have relation back to the filing of the petition, bound the Crown. It was held that it did not; and, so far as actual decision goes, that case does not touch the present. In giving judgment, however, the Master of the Rolls, in reference to an argument that there had been, in substance, a *cessio bonorum* effected by the presentation of the liquidation petition and the appointment of a receiver prior to the teste of the extent, said:—"Now, it is quite clear that the Crown can only take under a writ of extent the property of the debtor at the time of the issue of the writ. If the debtor has assigned or transferred his property, of course the Crown cannot take it. Therefore it is necessary to consider what the effect of the presentation of the petition is." He then proceeds to consider that question; and he held that the presentation of the petition and the appointment of the receiver did not amount to a *cessio bonorum*. James, L.J., says:—"In the early part of the argument of the Solicitor-General I was trying to arrive at the conclusion that this could be construed into an equitable *cessio bonorum*; but I cannot see my way on any legal principle to arrive at such a result from what took place. At the utmost, it is an offer to do something, which may result, at some future time, on the happening of some contingency, in a *cessio bonorum*. But the offer to part with the goods is not a parting with them, so as to prevent the Crown, which has a legal right, from taking the goods in the meantime."

From these passages in the judgments, Mr. Ronan argued, and, as I think, rightly, that if in that case there had been, as there had been here, a *cessio bonorum* before the specific right of the Crown attached, the Court would have decided against the priority of the Crown. But, in my mind, that result would have ensued from provisions in the English Bankruptcy Act of 1869, 32 & 33 Vict. c. 71, to which there are no equivalents in our Irish code. There is between the 32nd section of that Act and the 49th section of our Act of 1872, in addition to some small differences of detail unnecessary to be mentioned, this particular distinction, that the English section contains, and the Irish section does not contain, the provision that,

save as mentioned in the section, "all debts provable under the bankruptcy shall be paid *pari passu*." In the English Act these words are found in a section in which, as in our Irish Act, the word "debts" unquestionably includes Crown debts; and this provision, in my opinion, plainly extinguished the prerogative right in respect of all debts not specifically excepted in it. As then, the debt in *In re Bonham* (1), which was one due by a postmaster, was not within the class of debts to which priority is given by the 32nd section of the English Act of 1869, it was necessary in order to establish the prerogative claim in that case that the right of the Crown should be one paramount to the bankruptcy, and not through the bankruptcy. Had there been a *cessio bonorum* before the *teste* of the extent, the bankrupt's property would have passed to the trustee before it became subject to any specific lien for the Crown debt; and thus it was a material question there to consider the date of the *cessio bonorum*. As however there is no statute in this country which extinguishes the prerogative priority in respect of the debt in question here, a similar train of reasoning is not applicable.

It may be said that the distinction I have suggested between *In re Bonham* (1) and the present case is inconsistent with the decision *In re Henley* (2), because in the Winding Up Act of 1862, upon which the latter case was decided, there was a direction that the Company's liabilities should be paid *pari passu*. The two cases may, however, well stand together. It was held in *In re Henley* (2) that the Winding Up Act of 1862 did not bind the Crown, which was equivalent to holding that "liabilities" in sect. 133 did not include Crown debts. The prerogative therefore continued to exist notwithstanding that provision. It was otherwise, however, with the Bankruptcy Act of 1869. The 32nd section not only provided that "other debts" should be paid *pari passu*, but it did so in a section the context of which, as I have already explained, showed that "other debts" included Crown debts. The levelling provision therefore in the one case, viz. that of the Winding Up Act of 1862 bound, and in the other—that of the Bankruptcy Act of 1869—did not bind, the Crown.

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(1) 10 Ch. D. 595.

(2) 9 Ch. D. 469.

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For these reasons I agree with the opinion expressed by Judge Boyd that the provisions of the Bankruptcy Acts, giving priority to the particular Crown debts mentioned, do not affect the priority of the Crown for other debts, such as that in question here; but I think it necessarily follows from this opinion that he should have acceded to the application of the Commissioners of Inland Revenue.

The appeal must be allowed, and an order made for payment to the Commissioners of the sum due.

The Commissioners should not, I think, receive their costs, either in this Court or in the Court below: and the assignees should have their costs out of the estate.

Solicitor for the Inland Revenue: *R. O'Brien Furlong.*

Solicitors for the assignees: *Black & Howe.*

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March 2.

CONNOR v. POTTS.

(1896. No. 204.)

Vendor and purchaser—Innocent misrepresentation by vendor as to acreage—Purchase-money calculated on acreage represented—Specific performance with abatement in price.

It is a general principle that where a misrepresentation is made by a vendor as to a matter within his knowledge, even though it may be founded upon an honest belief in the truth of what he states, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed so far as the vendor is able to do so, and to have compensation for the deficiency.

The plaintiff agreed to purchase land for £5500 on the representation by the defendant that it contained 412 acres, the price being roughly arrived at by multiplying £12 10s. by that number. The area was in fact less by 67 acres. The representation was made in the belief that it was true:—

Held, that the plaintiff was entitled to specific performance as to the real acreage, with a deduction from the purchase-money in respect of the deficiency, at £12 10s. per acre.

The case of *Earl of Durham v. Legard* (34 Beav. 611) must be treated as an exception to the general rule.

ACTION for specific performance of a contract for the sale of lands. The facts of the case are stated in the judgment of the

Vice-Chancellor. The letters therein referred to being important only on the questions of fact involved, are not material for the purposes of this report.

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O'Shaughnessy, Q.C., and *Campbell, Q.C.*, (with them *Hunt*), for the plaintiff, referred to *Mc Kenzie v. Hesketh* (1); *Powell v. Elliott* (2); *Hill v. Buckley* (3); *Dyas v. Stafford* (4); *Tamplin v. James* (5); *Cordingley v. Cheesebrough* (6); *Fry on Specific Performance* (3rd Ed.), pages 571, 578.

The Right Hon. The Mac Dermot, Q.C., and *Matheson, Q.C.* (with them *O'Rorke*), for the defendant, referred to *Earl of Durham v. Legard* (7); *Manser v. Back* (8); *Neap v. Abbott* (9); *Calverley v. Williams* (10); *Phelps v. White* (11); *Lavery v. Pursell* (12); *In re Northumberland Avenue Hotel Company, Limited* (13).

THE VICE-CHANCELLOR :—

This action is brought by a purchaser for specific performance of a contract for a sale by the defendant to him of 443 acres of the lands of Knockcairn and Fourscore for the sum of £5500, or in the alternative for performance of this contract to the extent of 376 acres, part of the 443 acres, and damages or compensation for the remaining 67A. 3R. 0P.

March 2.

The material facts of the case are as follows :—The defendant was the tenant of several farms on the Wallace Estate, including the farms in question. He employed Messrs. Ferguson & Harvey estate agents, to obtain purchasers and receive proposals for the farms. The plaintiff is a farmer residing in the locality, and he desired to purchase the farms in question. In the beginning of November, 1895, he applied to Ferguson & Harvey on the subject, and informed them that he wished to buy the farms of Knockcairn and Fourscore, and named a sum of £5000 as the

(1) 7 Ch. D. 675.

(2) L. R. 10 Ch. 424.

(3) 17 Ves. 394.

(4) 7 L. R. Ir. 590; 9 L. R. Ir. 520.

(5) 15 Ch. D. 215.

(6) 3 Giff. 496.

(7) 34 Beav. 611.

(8) 6 Ha. 443.

(9) C. P. Cooper, 333.

(10) 1 Ves. Jun. 210.

(11) 5 L. R. Ir. 318; 7 L. R. Ir. 160.

(12) 39 Ch. D. 508.

(13) 2 Times' L. R. 210; 33 Ch. D.

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price ; but nothing material was done on that occasion. On the 22nd of November plaintiff received from them the following letter. [His Lordship read the letter.] This is a very important letter, as it shows that the defendant required an exact statement of the quantity plaintiff desired to buy, and that the quantity the defendant had to sell in Knockcairn was 316 acres, subject to the rent of £155 8s. 11*d.*

The plaintiff, on the following Tuesday, which was the 26th, went to the office of Ferguson & Harvey, and had a conversation with them on the subject. He swears that he then offered £5000 for the two farms, and that Harvey asked if he was aware there were more than 400 acres in the lands mentioned in the letter, and that plaintiff said he had their letter to that effect, and that he would give £12 an acre for the whole lands, which would amount to close on the £5000, and that they stated they would lay his offer before the defendant. On the 11th December Ferguson & Harvey wrote to the plaintiff, stating that they had had a further interview with the defendant, and asking him to call on them. He did call, and as Mr. Ferguson stated in his evidence, they had some conversation, in which Ferguson stated that the defendant had not named any price, but that plaintiff had better make an offer, and they would submit it to him ; that after some further conversation, which he did not state, the plaintiff eventually offered £5500, which Ferguson said he would submit to the defendant. The plaintiff swears that on that occasion Ferguson told him that the defendant had called on them and that they had gone through the figures of the farms, and calculated what plaintiff could afford to give for them, and that plaintiff had better increase his offer of £5000, and that Ferguson produced a list of all the farms of the defendant which they had to sell, and which was given in evidence. It contains figures in pencil, made by Ferguson, which show that Knockcairn contained 316A. 1R. 19P., and Fourscore 126A. 2R. 10P., making together 442A. 3R. 29P., and that the rents were £155 8s. 11*d.* and £80 respectively. Plaintiff swore that Ferguson thereupon multiplied the acreage by £12 10s., and brought out £5500 and a few pounds over, and that they were both acting on the 442 acres, and thereupon plaintiff offered him £5500. Now Ferguson admitted, on cross-examina-

tion, that he was himself then under the impression that the acreage was 442 acres, and that there was a talk about selling by the acre, and that plaintiff asked him how much £12 10s. an acre would make, and that he Ferguson made a rough calculation that made it something a little under or over £5500, and that when he saw it came so close he said to the plaintiff that he should make an offer of £5500. Mr. Harvey, who was also examined, admitted on cross-examination that he also believed that there were 442 acres in the farms, and that plaintiff was buying and defendant was selling 442 acres. Both Ferguson & Harvey attributed their mistake to some incorrect memorandum they had obtained from the Wallace estate office. However that may be, it is plain that all these three persons, plaintiff, Ferguson, and Harvey, entertained at the time the belief that the lands did contain 442 acres, and the negotiation was carried on and closed in this mistaken belief. But if there was a doubt on this it is wholly removed by the very important letter written by Ferguson & Harvey to the defendant, dated the 18th of December, 1895. [His Lordship read the letter.]

On this evidence I have no doubt that the plaintiff offered the sum of £5500 on the representation by the defendant through his agents that the lands contained 442 acres.

Messrs. Ferguson & Harvey stated that they did not sell by the acre, and had no authority to do so. If it were to be dealt with as a matter of credit between the plaintiff and Ferguson & Harvey, I cannot leave out of consideration that Ferguson & Harvey have a very material interest in endeavouring to excuse themselves for their part of this mistake. But it may be true that they did not sell or profess to sell these lands by the acre; but that is a different thing from representing to the plaintiff, with a view to inducing him to purchase at £5500, that they did contain 442 acres. It may not have been a sale by the acre, but it was a sale at a bulk price, which they knew the plaintiff calculated, and which they helped him to calculate, on the mistaken basis of the supposed acreage. There was no fraud on their part in this, for they swear, and I believe it, that they themselves believed the lands did contain 442 acres. Fraudulent misrepresentation is not necessary for the plaintiff to establish, for a

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mistaken representation by the defendant of a matter that it was his duty to state correctly, and on the faith of which he knew the plaintiff acted, is sufficient, though he may himself have believed it to be true.

The defendant accepted the offer of £5500, and the agreement set out in the statement of claim bearing date the 21st December, 1895, was prepared, except the addition as to £3000 remaining out on mortgage. It was taken by Mr. Harvey to plaintiff's house for signature. He stated that the addition was then made by him as to the £3000 being left outstanding; that he told plaintiff before he signed that defendant would not guarantee the acreage: and that the plaintiff brought an old book or something with the acreages in it and made up that of Knockcairn at 315 acres, which he (Harvey) put down in his book, and stated that defendant would not let him say anything about acreage. It was sought to rely on this as showing that plaintiff possessed independent means of knowledge. I do not so regard it. The plaintiff swore, and I believe him, that on that occasion Harvey produced a slip of paper with the acreages and rents of the farms, the acreages being 316A. 1R. 19P. and 126A. 2R 10P.; and the rents £155 8s. 11d. and £80; and said that it was a copy of the statement he sent to the defendant on the Wednesday before. This shows that the same representation was repeated on the occasion of the signing of the agreement. It also shows that the defendant was again informed of the making of this representation to the plaintiff by his agents. If he knew that this was not the true acreage he was guilty of a fraud. If he did not know this, he took upon himself to make a material misrepresentation of a fact which he ought to have known and as to which he should have satisfied himself before making the representation.

The general principle applicable to this case is well established that where a misrepresentation is made by a vendor as to a matter within his knowledge even though it may be founded upon an honest belief in the truth of what he states, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed so far as the vendor is able to do so, and to have compensation for the deficiency.

The defendant disputed the application of this rule to the

present case on the ground that here the representation was not as to the contract itself but as to a separate and distinct matter collateral to the contract which cannot give the purchaser a right to compensation. But I am at a loss to understand how a representation as to the contents of the lands, the subject-matter of the contract, can be treated as collateral to the contract. The plaintiff was led by the defendant to believe that the defendant was selling 442 acres of land when he had no title to 67 acres of that quantity.

It was also contended that so large a deficiency of the estimated acreage prevents this Court from dealing with the case as one for specific performance so far as the defendant can perform the contract with compensation for the deficiency. But that is not the rule on which the Court proceeds, and it is only necessary to refer to *McKenzie v. Hesketh* (1) to show that the Court will grant partial performance with compensation in such cases. There is no difficulty here in ascertaining the amount of the compensation, as it is a mere calculation of 67 acres at £12 10s. an acre which is to be deducted from the amount of the purchase money. The case of the *The Earl of Durham v. Legard* (2) was relied on by the defendant in support of this contention, but that case must, in my opinion, be treated as an exception to the general rule, and was decided by Lord Romilly on the ground of the unfair and unreasonable result that would occur in applying the rule to a case where the portion of the estate to which the vendor could not show title was so very large, being over 10,000 acres out of 21,000.

On the whole case I am of opinion that the plaintiff is entitled to judgment for the specific performance of the contract as to the portion of Knockcairn to which the defendant can show title, being 249 acres and the entire of Fourscore 126A. 2R. 10P., and that he is entitled to compensation for the 67 acres deficiency of the acreage of Knockcairn, at the rate of £12 10s. per acre to be deducted from his purchase money of £5500.

The defendant must pay the plaintiff's costs of the action.

Solicitor for the plaintiff : *Berryhill*.

Solicitors for the defendant : *O'Rourke & Son.* D. M'C. M.

Ross, J. IN THE MATTER OF THE ESTATE OF JOHN OTWAY
 1897. WEMYS, OWNER; THOMAS PALMER CHAPMAN,
 July 6, 21. PETITIONER; CONTINUED IN THE NAME OF MRS. JULIA
 SOPHIA WEMYS, AS OWNER; SIR LEOPOLD G.
 HEATH AND OTHERS, AS PETITIONERS.

Insolvent estate—Land Law (Ireland) Act, 1896, s. 40—Petitioners' incumbrance exceeding value of estate—Private proposal of petitioners to purchase—Right of petitioners to dismiss petition.

Petitioning creditors, whose incumbrance (the first charge) largely exceeded the possible selling value of the estate, brought in a proposal to purchase; and in the alternative applied to discharge the absolute order for sale and to dismiss the petition. Both applications were opposed by a puisne incumbrancer, who was also a tenant in occupation. The 40th section of the Land Act, 1896, admittedly applied:—

Held, (1) that the proposal could not be entertained without making an offer to the tenants under sect. 40;

(2) That, under the special circumstances of the case, the petitioners were entitled to have the petition dismissed.

MOTION on behalf of the petitioners for an order that the proposal of the petitioners, dated 15th December, 1896, to purchase the lands and premises comprised in the absolute order for sale for £34,000 be accepted, or, in the alternative, that the petition for sale in this matter be dismissed.

The property for sale consisted of two lots. Lot 1 was the mansion-house and demesne of Danesfort, containing 411A. 3R. 28P. Part of the demesne was held under a Court letting, at the yearly rent of £390. Lot 1 was held with Lot 2 under a fee-farm grant, dated 4th October, 1711, at the yearly fee-farm rent of £212, but indemnified by Lot 2 against the whole of the rent. Lot 2 consisted of agricultural holdings; the total annual rental was £1165, net annual rental £868 3s. 9d. The petitioners proposed to purchase Lot 1 for £4000, and Lot 2 for £30,000.

The petitioners, who were trustees for the Hand-in-Hand Insurance Co., made an affidavit, filed 16th December, 1896, in

which they stated that there was due to them, as first incumbrancers on the estate, the sum of £27,000 principal, and £7450 3s. 1d. for interest to the 14th December, 1896. The costs of survey had been paid, and the solicitors having carriage were willing to waive their costs on petitioners undertaking to pay them.

The gross rental of the estate was £1568 8s. 8d.; but the amounts received by the petitioners during the past six years were—1891, £1087 4s. 9d.; 1892, £1150; 1893, £954 13s. 3d.; 1894, £1123 2s. 11d.; 1895, £950; 1896, £1050.

In addition to the sums due for principal and interest, the petitioners had paid their solicitors for costs down to the end of 1894 sums amounting in the aggregate to £402 7s. 2d., and had paid to the Commissioners of Woods and Forests £343 for the purchase of a reversion in the Crown, in addition to which there would have to be paid the costs incurred since 1st January, 1895, including the final notice to tenants, rentals and printing.

It appeared that the amount of interest had been gradually increasing from £2946 5s. on the 22nd January, 1884, to £7450 3s. 1d. on the 11th December, 1896.

The mansion-house was not let, and it was stated that before it could be made productive a large outlay would be required.

Julia Doyle, a tenant on Lot 2, was also a puisne incumbrancer for £3170.

Price, Q.C., for the petitioners :—

Having regard to the large sum due and the outside value of the estate, it is obvious that no tenant could compete with the first incumbrancers. They have an interest in bidding up to the amount due on foot of their incumbrance, and they are entitled to do so : see *per Walker, L.J.*, in *Owen's Estate* (1). The amount of interest due will be increasing, and sending the case to the Land Commission would be a mere formality adding to the load of costs.

But if the Insurance Company cannot buy they are desirous of entering into possession even as mortgagees, and therefore to have the alternative part of the notice of motion granted.

(1) [1897] 1 Ir. R. 263.

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This case presents special circumstances sufficient to justify the Court in dismissing the petition and withdrawing the estate from sale : see *per* Palles, C.B., [1897] 1 I. R. 239, 240, and *per* Barry, L.J., *ibid.* pp. 257, 258.

The incumbrancers whose consent is required are persons who have a reasonable chance of being paid. Julia Doyle's incumbrance could not possibly be reached. Where a first incumbrance is so large as to exceed any possible rate of purchase the incumbrancer is the only person really interested in the estate.

T. M. Healy, for Julia Doyle :—

After an absolute order for sale the Court ought not, even apart from the 40th section, to withdraw the estate at the instance of one incumbrancer. The discretionary power of the Court is appealed to for the purpose of preventing a puisne incumbrancer purchasing her holding under the section. It is clear that the Lord Chief Justice was of opinion that the operation of the section could not be got rid of in the case of an insolvent estate : see [1897] 1 I. R. 208. The insolvency of the estate makes the section applicable. The discretionary power to discharge the order for sale was intended to be exercised in favour of the landowner—one of the ancient territorial aristocracy—and not in favour of an incumbrancer who is only looking for his money.

Price, Q.C., in reply :—

As to solvency of the estate being the test of the Court's jurisdiction to discharge the order for sale, although one sentence of the Lord Chief Justice might bear that meaning, he is only giving one of several instances, as appears by the context. His Lordship says a few lines before "He," the Land Judge, "may at any time for good cause cancel the absolute order for sale and dismiss the petition." The Lord Chief Baron's observations at page 240, are very wide and general.

July 21.

Ross, J. :—

The only point I had any doubt about was whether the solvency of the estate was a necessary condition to the exercise of my discretionary power to dismiss the petition. This application

consists of two parts. First, that the premises be sold to the petitioners (the Hand-in-Hand Insurance Company) for £34,000. Now I hold that I have no power to do anything of the kind. Mr. Price points out that if I issue a request to the Land Commission under the 40th section, when I have the offer of his clients, which is more than the tenants would give, it is merely heaping up useless costs on the estate. Notwithstanding that argument, I hold that before accepting the offer of the Insurance Company it would be incumbent on me to send the case to the Land Commission to be valued. The tenants have an absolute right, if a sale is to take place, to have the offer made to them.

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ESTATE.

The second part of the application, in the alternative, is that this petition be dismissed on the following grounds—that the first incumbrancers are the only persons interested; that the others have merely a nominal interest; and that the petitioners, being in substance owners of the whole beneficial interest, they have the right to have the estate withdrawn from the Court, and subsequently to exercise whatever legal rights they may have.

I hold that the petitioners are the only persons who have any real interest in this estate. The second incumbrancer is a person who seems to have been very badly treated and entitled to a great deal of sympathy; but I do not see how, under any conceivable circumstances, I would do her any good by keeping the estate in Court. Whatever rights she has will remain unaffected after the petition has been dismissed.

As to the argument on behalf of the tenants, I held, in *Owen's Estate* (1) that they have, under the Act of 1896, an interest in the sale but not in the estate. That opinion was approved of by the Court of Appeal. Therefore, holding as I do, that the only persons interested are the petitioners, I grant the second part of the application.

Solicitors for the petitioners: *William C. Hogan & Sons.*

Solicitor for Mrs. Doyle: *Patrick A. Murphy.*

Solicitor for the tenants: *Michael Buggy.*

W. G.

(1) [1897] 1 Ir. R. 263.

CHARLES BAYER v. CONNELL BROTHERS & CO.

(1896. No. 377.)

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March 2, 9.

Trade mark—Action for infringement—Jurisdiction of Irish Court to order rectification of register—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 90, 111.

In an action for infringement of trade mark the defendant denied infringement, and pleaded that the alleged mark was not a trade mark, and that the registration was invalid, and counterclaimed that the registration should be set aside, and the register rectified accordingly.

By an interlocutory motion the defendant applied for an order that the registration should be set aside and expunged, and the register rectified. The plaintiff opposed the motion on the ground that the High Court of Justice in Ireland had no jurisdiction to order any alteration in the register of trade marks:—

Held, that the Court in Ireland had no jurisdiction, under the Act of 1883, to order any alteration or rectification of the register of trade marks, which was a special jurisdiction conferred on the High Court of Justice in England.

MOTION.

The plaintiff, trading as Charles Bayer & Co., is a manufacturer of ladies' corsets and underclothing in London and elsewhere, and the defendants are corset manufacturers in Dublin. The plaintiff alleged that he had for more than twenty years been selling corsets to which he had given the name of "C. B. Corsets," and had applied to them the mark "C. B.," which was regarded by the trade and the public as an indication that they were of his manufacture; that on the 29th of January, 1881, he registered as a trade mark in connection with corsets a device of a corset and the letters "C. B." within a star; and on the 12th of June, 1886, he registered the letters and word "C. B. Corsets" as an old trade mark in connection with corsets, and was still the registered owner of such trade marks; that the defendants were selling corsets of their own manufacture, marked conspicuously with the letters "C. B. & Co.," the words "& Co." being in very much smaller letters; and they were also making and selling corsets marked "C. B. D." He charged that both of these marks

were colourable imitations and infringements of his trade marks, and used by the defendants for the purpose of passing off their corsets as goods of his manufacture; and he prayed for an injunction, an account, and damages.

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The defendants denied the alleged infringement, and alleged as regards the trade mark registered on the 29th of January, 1881, that its distinctive characteristic was the device of a corset within a star, and that the letters "C. B." formed only a part, and not the essential part of the said trade mark, and that the said trade mark was not a trade mark capable of registration; as regarded the alleged trade mark registered on the 12th of June, 1886, that it was not an old trade mark in use prior to August 13th, 1875, and was not capable of being registered as such. The letters "C. B.," as the initials of defendants' firm, had been used by the defendants in connection with corsets prior to 1886; and they denied that the mark "C. B. Corsets" was a trade mark, or that the plaintiff was properly registered as the proprietor thereof. The mark used by the defendants was wholly unlike that of the plaintiff, and the defendants' boxes, in colour and general get-up, were altogether dissimilar to those of the plaintiff; no member of the trade or of the public could possibly mistake one for the other, and no person was ever misled or deceived. By counterclaim the defendants applied that the letters "C. B." should be expunged from the trade mark registered by the plaintiff on the 29th of January, 1881, and that the entire registration of the alleged trade mark registered on the 12th of June, 1886, should be set aside and expunged, and the register of trade marks rectified accordingly.

The plaintiff, in his reply, contended "that this Court has no jurisdiction to expunge or set aside the registration of a trade mark either wholly or in part."

The case now came before the Court upon an interlocutory motion on behalf of the defendants for an order "that the letters 'C. B.' be expunged from the trade mark registered by the plaintiff on the 29th of January, 1881, and that the entire registration of the alleged trade mark registered on the 12th of June, 1886, should be set aside and expunged, and the register of trade marks rectified accordingly."

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Serjeant Dodd, Q.C., and D. Kehoe (with them the *Solicitor-General, Kenny, Q.C.*), for the defendants, in support of the motion:—

In an action for infringement of an alleged trade mark, the plaintiff cannot succeed if the mark is not within the definition section of the Act under which it was registered, even though it has been more than five years on the register: *Bodega v. Owens* (1); *In re Palmer* (2). But, in the case of a trade mark which has been more than five years on the register, it would seem that such a defence, so long as the mark remains on the register, is not open, either as a defence or by counterclaim, and that the proper course is by a motion to have the mark removed from the register: *Apollinaris Company v. Herrfeldt* (3); *Pinto v. Badman* (4). We have, therefore, adopted that course. We submit that the High Court of Justice in Ireland has a concurrent jurisdiction with the Courts in England and Scotland to grant the motion. Section 111 of the Act of 1883 preserves the jurisdiction of the Scotch and Irish Courts.

Ronan, Q.C., and Matheson, Q.C. (*A. F. Blood* with them), for the plaintiff:—

The Irish Court has no jurisdiction, and the application, if made at all, should be made to the Court in England. The jurisdiction to expunge or vary an entry in the register of trade marks is a special jurisdiction conferred by section 90 of the Act of 1883 on "The Court," and the definition section (117) defines "The Court" to mean the High Court of Justice in England. If the Legislature had intended to give a concurrent jurisdiction to the Scotch and Irish Courts, they would have adopted the language usual in such cases, by defining "The Court" to mean "in England the High Court of Justice in England, in Scotland the Court of Session, and in Ireland the High Court of Justice in Ireland." Section 111 did not confer the special jurisdiction to rectify the register on the Scotch and Irish Courts. All it did was to preserve their existing jurisdiction, and the existing juris-

(1) 6 R. P. C. 236; 7 R. P. C. 31; (3) 4 R. P. C. 478.
23 L. R. Ir. 371. (4) 8 R. P. C. 181; Sebastian, 220.
(2) 21 Ch. D. 47.

diction did not include any power to vary or rectify the register of trade marks, which is kept in London; and though copies of specifications and drawings of patents are directed to be transmitted to Edinburgh and Dublin, there is no such provision with regard to trade marks. The expressions of Lindley, L.J., and Bowen, L.J., in *King & Co.'s Trade Mark* (1), show that in their opinion the Irish Court had no such jurisdiction.

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THE MASTER OF THE ROLLS :—

This case comes before me upon a notice of motion, dated 4th February, 1897, delivered by the defendants to the plaintiff, for “an order that the letters ‘C. B.’ be expunged from the trade mark registered by the plaintiff on the 29th day of January, 1881, and that the entire registration of the alleged trade mark registered on the 12th June, 1886, should be set aside and expunged, and the register of trade marks rectified accordingly.” The motion came on and was heard upon the 2nd of this month, and I announced my intention of giving judgment upon the 4th, but was requested by counsel to postpone it, for the convenience of the parties, until this day, and I accordingly did so.

March 9.

The action in which the notice is served is brought by Charles Bayer, trading as Charles Bayer and Company, who appears to be an extensive manufacturer of corsets in London, Portsea, Bath, Bristol, and elsewhere, for an injunction to restrain the defendants, Connell Brothers, an Irish firm, “from passing off, or doing or continuing acts which are calculated to pass off, the defendants’ corsets as those of the plaintiff, and from using the plaintiff’s marks ‘C. B.’ in connection with the defendants’ corsets, and from using the marks ‘C. B. & Co.’ and ‘C. B. D.’ or either of them, in connection with the defendants’ corsets; and for a direction to deliver up all corsets of the defendants’ manufacture marked in contravention of the rights of the plaintiff, and for an inquiry as to damages,” and so forth. The defendants deny the whole case of the plaintiff, and deny his right, among other things, to this alleged trade mark, and counterclaim as follows:—“that the letters ‘C. B.’ should be expunged from the trade mark

M. R. registered by the plaintiff on the 29th January, 1881, and that
 1897. the entire registration of the alleged trade mark registered on

BAYER 12th June, 1886, should be set aside and expunged, and the
v. register of trade marks rectified accordingly." It will be observed
CONNELL. that the notice of motion is substantially in the same terms as
 that of the counterclaim.

The application assumes the form of an interlocutory motion, on account of certain English authorities deciding 1, that without an application to rectify the register, the defendants cannot obtain the relief, or defend themselves in the action, in the way they claim to be entitled to; and 2, that such an application cannot properly be made by way of counterclaim: *Pinto v. Badman* (1); *Apollinaris Co. v. Herrfeldt* (2). These last points I have not at present to decide: I assume them.

The plaintiff, however, contends that there is no jurisdiction in this Court to make any such order as the defendants seek; and that is really the question I have now to decide. Obviously, if there is a jurisdiction, it ought to be exercised (to the extent of hearing and determining the matter) in this Court, where the action is, instead of sending the defendants, when impleaded here, to find material for their defence in the English Courts. But the matter depends upon statute, and the sole question at present to be decided is whether the Patents, Designs, and Trade Marks Act of 1883 (46 & 47 Vict. c. 57) confers upon the Irish Courts any power to order the register to be altered, by expunging a trade mark, or otherwise rectifying it. The question is one apart from the ordinary jurisdiction of this Court. The power, if it exists, is the creature of the statute, and must be found in it. The present application is made under section 90 of the Act; and that section provides that "The Court may, on the application of any person aggrieved by the omission, without sufficient cause, of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit."

(1) 8 R. P. C. 181.

(2) 4 R. P. C. 478.

Now, if "the Court," in this section, includes the High Court of Justice in Ireland, the jurisdiction exists. This sends us to the definition clause (section 117), which says, "'The Court' means (subject to the provisions for Scotland, Ireland, and the Isle of Man) Her Majesty's High Court of Justice in England." Here, again, we have to look elsewhere, to see what are "the provisions for . . . Ireland," and these provisions are contained in section 111: 1. "The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks; and with reference to any such proceedings in Scotland, the term 'the Court' shall mean any Lord Ordinary of the Court of Session, and the term 'Court of Appeal' shall mean either Division of the said Court; and with reference to any such proceedings in Ireland, the terms 'the Court' and 'the Court of Appeal,' respectively, mean the High Court of Justice in Ireland and Her Majesty's Court of Appeal in Ireland." 2. "If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification shall be served on the comptroller, and he shall rectify the register accordingly."

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This is a very peculiar section. Usually, as was pointed out by Mr. Ronan, where a concurrent or co-ordinate jurisdiction is conferred upon the Courts in London and Dublin, "the Court" is defined as meaning in England the High Court of Justice in England, and in Ireland the High Court of Justice in Ireland; and if the defendants' contention in the present case is correct, section 117, taken in connection with section 111, must mean simply that. But the language of section 111 precludes that construction. Some distinction is plainly meant to be drawn between the "special" jurisdiction conferred by the Act and a jurisdiction not so conferred. Reading the clause as it stands, it is impossible to give to the word "jurisdiction," which occurs three times in the initial clause, the same meaning, or at least the same extent and scope, in all three places. To read it so makes nonsense of the section. I shall just read it in that way. "The

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provisions of this Act conferring a special jurisdiction on the Court as defined by this Act, shall not, except so far as the special jurisdiction extends, affect the special jurisdiction of any Court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks." As I read the clause, it must mean "The provisions . . . conferring a special jurisdiction on the Court as defined by this Act, shall not, except so far as the *special* jurisdiction extends, affect the *general* jurisdiction of any Court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks." If this is the correct interpretation the general jurisdiction of the Irish Courts is to remain untouched, but the special jurisdiction is to be exercised only by "the Court," *i.e.* "Her Majesty's High Court of Justice in England" (section 117). That which is sought in this motion, is plainly an exercise of a special jurisdiction under the Act, and that alone. There can be no inherent original authority in an Irish Court to correct a register of trade marks in England. I pointed out during the argument that there does not appear to be in the statute any express declaration that the register is to be kept in England; but having regard to previous legislation upon the subject, the Patent Office, which is referred to over and over again, and the office of the comptroller, are in London; and above all, what everybody knows as a matter of common knowledge, the register of trade marks must necessarily be kept in England, and of course in London.

The last portion (sub-section 2) of section 111 was strongly relied upon as supporting the defendants' view. "If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification shall be served on the comptroller, and he shall rectify the register accordingly." That is a very curiously worded clause. These words certainly do imply that some rectification of a register may be "required in pursuance of a proceeding" in a Court in Ireland. But "required" is an ambiguous expression, and may mean "necessitated." The alteration or rectification is not spoken of as "directed by" or "ordered by" the Court, but "required in pursuance of" an Irish order or decree. In the case of patents, this would no doubt

be strictly correct in any view. In the case of trade marks it would be strictly accurate, if in the course and exercise of its general jurisdiction an Irish Court decided some question affecting the right to the registration; if, for instance, the ownership of the trade mark was decided to have been wrongly registered, on the ground of fraud, or the like. The present action is itself an appeal to this general jurisdiction. In such a case the rectification of the register would be "required in pursuance of" the decree, in order to make the register correct, though it would not be "required" in the sense of being ordered by the judgment. The Act deals with patents and designs, as well as trade marks. As to patents, of course different considerations exist, having regard to the fact that in Ireland patents for inventions under the great seal of Ireland were formerly revocable by *scire facias* in the Irish Courts; and no doubt a similar power exists under the altered procedure of recent legislation. This, however, cannot apply to trade marks. It is important to note that in the first Trade Marks Act, properly so called, the Act of 1875 (38 & 39 Vict. c. 91), the only Court which could possibly touch the register directly, is "any of Her Majesty's Courts of law or equity at Westminster." That appears to me to have a very important bearing upon the question. It is "an Act to establish a register of trade marks." Of course it has been repealed, but that does not affect the importance of it in considering the question now before me. It does not deal with patents or designs: trade marks were, for the first time, made the subject of a special Act of Parliament; though, no doubt, the provisions of some of the Copyright Acts did apply to trade marks. But in this Act, section 5 provides, "If the name of any person who is not for the time being entitled to the exclusive use of a trade mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade marks as a proprietor of such trade mark, or if the registrar refuses to enter on the register as proprietor of a trade mark the name of any person who is for the time being entitled to the exclusive use of such trade mark in accordance with this Act, or otherwise in accordance with law, or if any mark is registered as a trade mark which is not authorised to be so registered under this Act, any person aggrieved may apply in the

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prescribed manner for an order of the Court that the register may be rectified; and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may award damages to the party aggrieved"; and machinery is provided for carrying that out. We come then to see what is "the Court" referred to in that section; and in section 10 it is defined, "For the purposes of this Act 'Court' means any of Her Majesty's Superior Courts of law or equity at Westminster, or any Court to which the jurisdiction of such Courts may be transferred" that does not apply to Ireland—"or any one or more of such Courts which may be declared to be the Court for the purposes of this Act by such general rules as aforesaid"—that does not apply to an Irish Court—"but the provisions of this Act conferring a special jurisdiction on the Court as above defined"—that is the Courts at Westminster—"shall not, excepting so far as such jurisdiction extends" (those words are singularly like those of section 111 of the Act of 1883), "affect the jurisdiction of any Court in Scotland or Ireland, in causes, actions, suits, or proceedings relating to trade marks." Pausing there, we see the same use of the word "jurisdiction" three times repeated; and whatever ambiguity there may be in the section of the Act of 1883, as to the meaning which must be given to that word, it is perfectly plain that under the Act of 1875 there can be no such ambiguity. "The provisions of this Act conferring a special jurisdiction on the Court as above defined shall not, excepting so far as *such* jurisdiction extends," *i. e.* the special jurisdiction—"affect the jurisdiction of any Court in Scotland or Ireland, in causes, actions, suits, or proceedings relating to trade marks." There was no power given to any Court in Scotland or Ireland to alter or rectify the register. The section goes on, in words similar to those of sub-section 2, of section 111 of the Act of 1883, to provide, "And if the register requires to be rectified" that, also, throws a light upon the use of the word "required" in section 111; that is, if it needs to be rectified in consequence of any proceeding—"in consequence of any proceedings in any such Court in Scotland or Ireland, due notice of such requirement shall be given to the registrar, and he shall rectify the register accordingly."

Now, it is perfectly plain that that was not affected either by the Act of 1876, or by the Act of 1877, or by any other statute until the Act of 1883, which is in almost identically the same language; and it is impossible to suppose that the latter Act intended to confer any such jurisdiction on an Irish Court. I am thus strongly of opinion that I have no jurisdiction to grant the present application—a result at which I arrive with regret, because it is fraught with grave inconvenience to the parties, who will have to litigate the case in both countries. Had there been any decision contrary to the distinct view of the statute which I have expressed, I would gladly have followed it; but there is none. The question was referred to in the judgment of the Court of Appeal in England in *King & Co.'s Trade Mark* (1), and previously in the judgment of Kekewich, J., in *Kinahan v. Kinahan* (2). In *Kinahan v. Kinahan* (2) the question was merely mentioned in the course of the judgment, and does not appear to have been argued. In *King & Co.'s Trade Mark* (1) it appears to have been argued, and was referred to at more length in the judgments, though not decided. The decision is correctly stated in the first portion of the note prefixed to the report, “The High Court in England has jurisdiction under the Patents, Designs, and Trade Marks Acts, 1883 and 1888, to rectify the register of trade marks kept under those Acts, notwithstanding that the registered proprietor of the mark affected is domiciled in Scotland or Ireland. Whether the Scotch or Irish Courts have a concurrent jurisdiction with the English Courts to rectify the register, *quaere*.” The question as to the jurisdiction of the Scotch and Irish Courts was not necessary for the decision; they held that the English Court had jurisdiction, whether the Irish Court had or had not. I shall refer to a few passages in the judgment of Lindley, L.J. At page 476 he says: “It is necessary to observe, in dealing with the Act of 1883, that it is one Act of Parliament applicable to three things, patents, designs, and trade marks; it is applicable to the whole of the United Kingdom, England, Scotland, Ireland, and the Isle of Man; and its general provisions are framed in language to meet the three subject-matters with which it deals, and the three countries with which it deals. I attach some importance to that

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(1) [1892] 2 Ch. D. 462.

(2) 45 Ch. D. 78.

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general view, with reference to the argument of Mr. Hopkinson, as to the concurrent jurisdiction given to the Courts of England and Ireland. I am not going to decide to-day whether they have any concurrent jurisdiction or not. That the Courts in both countries have some jurisdiction is obvious, but whether they have such concurrent jurisdiction as is contended for is, to my mind, by no means clear. It is quite sufficient to show that the High Court in this country has jurisdiction over this particular subject-matter, and that the mode in which that jurisdiction has been exercised is not wrong." He then discusses the other matters which came directly before the Court, and at page 480 he says:—"It is in vain to say that the Court has not jurisdiction to make such an order. The thing to be rectified is, I do not say an English register, but a register for the whole of the United Kingdom; and the Court which has jurisdiction over that register is, amongst others, at all events, the High Court of Justice"—that is, the Court in England. "Then it is said that by reason of section 111 the Court has no jurisdiction, and that the moment you have got an Irishman or Scotchman with a registered trade mark, all applications affecting his trade mark must go to Ireland or Scotland. I fail to see that there is anything whatever in the language of the Act of Parliament which requires anything of the sort, and, as it appears to me I confess, it would be an extremely inconvenient construction or interpretation to put upon the Act. The sections of the Act which relate to Scotland and Ireland are sections 107 to 112. As I said before, these are general provisions, relating to patents, designs, and trade marks." He then refers to the sections; and with reference to section 111 he says:—"We have been pressed by Mr. Hopkinson to hold that that section which preserves to the Irish and Scotch Courts such jurisdiction as they had before gives the Irish and Scotch Courts exclusive jurisdiction—at least in this case: that is to say, in a case where a Scotchman or an Irishman has a registered trade mark. I confess I cannot so read it. There is nothing in this section—which is a preserving section and not an enabling section—which goes anything like that length; and yet that is, behind all that is form and technicality, the real struggle. The trade mark here belonging to an Irish Company, the Irish Company say, 'If you want to

touch our trade mark you must go to Dublin or Belfast to do it, and you cannot do it in London : ' that is the struggle. It appears to me that that contention is, in the face of the sections to which I have alluded, quite untenable. I purposely forbear discussing the wider question as to the extent of the concurrent jurisdiction of the Irish Courts." Bowen, L.J., at page 484, says : " This is, I will not say an English register, but it is a register formed for public purposes in the United Kingdom. It is to be available to all the subjects of Her Majesty. It is perfectly true that others, besides the subjects of Her Majesty, can take advantage of the register ; but the object of the register is to be a benefit to trade in England." That must mean trade in the United Kingdom. " The Courts in Ireland may or may not have concurrent jurisdiction in the matter : it is a point which it is not necessary for us to decide ; I will assume that they have." Kay, L.J., at page 489, makes use of some expressions which indicated, without at all deciding the matter, that he was in favour of the existence of a jurisdiction concurrent, at any rate, in the Irish Courts. He says :—" Now, I do not think it proper, and I am not going to decide now, or to express any confident opinion on the question whether such an application could be made before the Courts in Ireland. I confess at present the inclination of my opinion is that under section 111 it might possibly be made, because I read, at the end of that section, the direction that the comptroller shall alter the register, where an order for alteration of the register shall have been made in Ireland, and I presume that means an order made under the Act." Now, that is a little incorrect. The section does not say that at all. What it says is, " if any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland or Ireland." Kay, L.J., continues :—" At present I desire to reserve my opinion on that question, until some case occurs in which it is necessary to decide it."

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There is thus no decision upon the point ; and although the Trade Marks Act, 1875, is mentioned in some of the judgments in the last-mentioned case, its bearing upon this question does not seem to have been considered. I regard that Act as of very great importance. Some departure from the phraseology of a statute

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dealing only with trade marks was necessary when the Legislature came to embody in one Act provisions relating to trade marks, designs, and patents; but if so grave a departure was intended as the depriving of the English Courts of an exclusive jurisdiction in reference to trade marks, which undoubtedly they had under the Act of 1875, and the conferring of a co-ordinate jurisdiction upon the Irish and Scotch Courts, it would certainly have been expressed in direct language, and we should not have been left to spell it out of doubtful and ambiguous expressions, such as are to be found in the 111th section. I need not dwell upon the inconvenience which might result from possibly conflicting decisions as to the registration of the same trade mark in the Courts of the three countries. The question is one of the construction of the statute, and on that alone I decide it.

The order will be, "The Court being of opinion that it has no jurisdiction to make the order sought for, no rule on the present motion."

Solicitors for the plaintiff: *J. & J. Galloway.*

Solicitor for the defendants: *M. J. Hearn.*

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July 20, 21,
27.

IN RE FITZGERALD, DECEASED.

M'DONNELL v. FITZGERALD.

(1896. No. 145.)

Limitations, Statute of—3 & 4 Wm. 4, c. 27, s. 42—Interest on judgment—Administration of personal estate—Period of limitation.

The period of limitation applicable to the recovery of interest upon a judgment not registered as a mortgage is regulated by 3 & 4 Wm. 4, c. 27, s. 42, and only six years' interest is recoverable out of the personal estate of the judgment debtor.

Breslin v. Hodgins (I. R. 10 Eq. 260) not followed.

ADJOURNED SUMMONS.

This was a proceeding by summons to administer the personal

estate of Desmond J. E. Fitzgerald, the Knight of Glin. On May 10th, 1887, a judgment was recovered against the Knight of Glin in the Exchequer Division of the High Court of Justice in Ireland, by the Munster Bank for the sum of £3224 16s. On May 28th, 1887, a sum of £200 was paid to the Bank, leaving a balance due of £3024 16s. The Knight of Glin died on August 17th, 1895, and a sum of £3050 was recovered by the Bank out of the proceeds of a policy of insurance on the life of the deceased held as security. These proceedings were afterwards commenced to administer the personal estate of the deceased, and a claim was made by the Munster and Leinster Bank, in whom the interest of the Munster Bank had become vested, for the sum of £975 18s. 10d. balance of interest due on foot of the judgment. This sum was arrived at by calculating interest at the rate of 4 per cent. per annum on the sum of £3024 16s. from May 28th, 1887, to August 17th, 1895, the date of the death of the Knight of Glin. The defendant, the personal representative of the deceased, contended that only six years' arrears of interest were recoverable, and the matter came before the Judge in Chambers, and was adjourned into Court.

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Frederick Fleming, Q.C., for the defendant :—

3 & 4 Wm. 4, c. 27, s. 42, which deals with the recovery of arrears of interest in respect of money charged or payable out of land applies, and only six years' interest is recoverable. Section 40 of the same statute deals with the recovery of principal money secured by mortgage, judgment, or otherwise charged or payable out of any land, and makes the limit twenty years. The word "judgment" does not occur in section 42, but the words "charged upon or payable out of land" are a compendious way of expressing the words of section 40, "secured by mortgage, judgment, or otherwise charged upon or payable out of any land," and must be read as if the word "judgment" occurred therein, and only six years' interest is recoverable under a judgment, whatever be the form of remedy adopted : *O'Kelly v. Bodkin* (1) ; *Henry v. Smith* (2). The next Statute of Limitations is 3 & 4 Wm. 4, c. 42, s. 3, which

(1) 3 Ir. Eq. R. 390

(2) 4 Ir. Eq. R. 502

M. R. 1897. imposed the same limit for bringing an action of covenant as had been imposed by 3 & 4 Wm. 4, c. 27, s. 40, for recovering principal money charged on land, namely twenty years. This statute did not apply to Ireland, but a similar provision was enacted for Ireland by Pigot's Act, 3 & 4 Vict. c. 105, s. 32. In *Hughes v. Kelly* (1) it was decided that 3 & 4 Wm. 4, c. 27, s. 42, and Pigot's Act should be read together, and that only six years' arrears of interest was recoverable in a foreclosure suit, there being a covenant to pay interest in the mortgage deed. The Irish Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), repealed section 32 of Pigot's Act, so far as it related to personal actions in the Superior Courts of Law in Ireland, except so far as related to the jurisdiction of a Court of Equity, and by section 20 substituted the same period of limitation, the only difference being that the word "judgment" occurs in that section, and not in 3 & 4 Wm. 4, c. 42, s. 3, nor in Pigot's Act. The proviso at the end of section 20 of the Act of 1853 shows that it was not intended to interfere with 3 & 4 Wm. 4, c. 27, s. 42. The Act of 1874 (37 & 38 Vict. c. 57), s. 8, re-enacted in substance sect. 4 of 3 & 4 Wm. 4, c. 27, substituting twelve years for twenty. *Sutton v. Sutton* (2) decided that the limit of twelve years introduced by the Act of 1874 applied to the personal remedy on the covenant in a mortgage deed, as well as to the remedy against the land, and the same view was taken by this Court in *Nugent's Trusts* (3). The title of this Act, "Real Property Limitation Act," is incorrect, as it is not limited to charges on land, and the Act of 1874, as well as the Act of 1833, applies to judgments generally: *Hebblethwaite v. Peever* (4); *Jay v. Johnston* (5). *Breslin v. Hodgins* (6), decided by the Vice-Chancellor in 1876, is no doubt in favour of the Bank's contention, as it was there held that more than six years' arrears of interest were recoverable in a proceeding to administer the personal assets of a debtor, against whom a judgment had been recovered in 1862, the Vice-Chancellor holding that the case was governed by section 20 of the Common Law Procedure Act,

(1) 5 Ir. Eq. R. 286.

(4) [1892] 1 Q. B. 124.

(2) 22 Ch. D. 511.

(5) [1893] 1 Q. B. 189.

(3) 19 L. R. Ir. 147.

(6) I. R. 10 Eq. 260.

1853; and distinguishable from *Henry v. Smith* (1). But *Breslin v. Hodgens* (2) must be taken to have been overruled by the decision of the Court of Appeal in *Evans v. O'Donnell* (3), where it was decided, reversing the decision of the Vice-Chancellor in *Sherwood v. Hannan* (4), that a judgment creditor could not bring an action to administer the real or personal estate of the judgment debtor after the lapse of twelve years, the limit of twenty years in sect. 20 of the Common Law Procedure Act, 1853, being repealed by sect. 8 of the Act of 1874. It is true that this case dealt with the recovery of principal money, not interest, but the principle of it applies here, as it was held that the word "judgment" in the Act of 1874, as in the Act of Wm. 4, related to judgments generally, and not merely to such as might affect land, and that where the Act of Wm. 4 mentioned judgments as charged on lands, it meant merely judgments capable of being put into operation against lands, which could be done now by registering them under the Judgment Mortgage Act. *Henry v. Smith* (1), is still law and should be followed.

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R. H. Sheil, for the Munster and Leinster Bank:—

The Bank's claim is for eight and a-half years' interest, and should be allowed in full, as the period of limitation applicable is twelve, not six years. Section 20 of Pigot's Act (3 & 4 Vict. c. 105), entitles the Bank to interest on the judgment. To limit the claim to six years' interest, the defendant must show that the claim is in respect of "a sum of money charged on land," within 3 & 4 Wm. 4, c. 27, s. 42. Judgments were charges on land in the years 1841 and 1842, when *O'Kelly v. Bodkin* (5) and *Henry v. Smith* (1), were decided, but since the Judgment Mortgage Act of 1850 (13 & 14 Vict. c. 29), judgments are no longer charges on lands. *Evans v. O'Donnell* (3) only decided that the expression "judgment," in section 8 of the Act of 1874, meant a judgment though not charged on lands; but section 42 of 3 & 4 Wm. 4, does not contain the word "judgment," but only the words "money charged on lands." Section 20 of the Common Law Procedure

(1) 4 Ir. Eq. R. 502.

(4) 15 L. R. Ir. 334.

(2) Ir. R. 10 Eq. 260.

(5) 3 Ir. Eq. R. 390.

(3) 18 L. R. Ir. 170.

M. R. Act of 1853 expressly deals with judgments; the only effect of
 1897. *Evans v. O'Donnell* (1), is, that the limit of twenty years prescribed
M'DONNELL by that section is reduced to twelve years by the Act of 1874;
v. the section is not otherwise affected, and must have some force; the
FITZGERALD. words "actions upon any judgment" apply to recovery of interest
 due under a judgment as well as principal. *Breslin v. Hodgins* (2)
 is a decision in point, and should be followed.

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THE MASTER OF THE ROLLS:—

The question raised by this adjourned summons is whether there is any, and if so what, statutory period of limitation applicable to interest upon a judgment not registered as a mortgage upon land. The Munster and Leinster Bank claim to be paid eight and a-half years' interest out of personal assets. The personal representative contends that the claim is governed by section 42 of 3 & 4 Wm. 4, c. 27, and that therefore only six years are recoverable. No question as to the principal money arises in the case. The numerous changes in the law, both as to judgments and as to limitations of actions in certain cases, which have occurred since 1833, render the point one of some nicety.

By section 40 of the Act of 1833, it was provided:—"No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of signing a discharge for, or release of, the same, unless in the meantime some part of the principal money, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment or the last of such payments or acknowledgments if more than one was given." Section 42 provided:—"No arrears of rent, or interest in respect

of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrear of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.”

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For some time after the passing of this Act it was a question whether judgments were included in sect. 42, which does not expressly mention them. But *O'Kelly v. Bodkin* (1) and *Henry v. Smith* (2), to which I shall refer afterwards, decided that the words in sect. 42 must be taken to be a compendious way of indicating the same things which were expressed in sect. 40, and thus recognizing that judgments at that date were charges upon land. It is clear too from the latter of these cases that prior at any rate to the year 1853 the Act of 1833 barred all remedies for interest upon money secured by a judgment, as well personal as against lands. Indeed, this follows logically from holding that judgments are within sect. 42; because then the interest dealt with by sect. 42 must include interest upon money secured by a judgment.

It was sought to escape from this position by arguing that judgments, though expressly mentioned in sect. 40, were not within sect. 42. Sect. 40 is no doubt express; but sect. 42 only deals with charges upon lands—except as to legacies which are separately mentioned;—and as the law then stood, they were not properly charges upon land, but only gave the right to a writ of *elegit* by virtue of which lands might be extended. But the answer came, inevitably and inexorably, that sect. 42 must be taken to denote exactly what is denoted by sect. 40, and that in a sense judgments under the law as it stood were at least a potential charge, or a hovering lien upon lands. It is too late in the day to discuss this. It is settled ever since Lord St. Leonards' decision in *Henry v. Smith* (2), at all events.

Then came Pigot's Act, 3 & 4 Vict. c. 105, under which two great changes bearing upon the present question came into operation. Judgments under it became direct equitable charges upon

(1) 3 Ir. Eq. R. 390.

(2) 4 Ir. Eq. R. 502.

M. R. the debtor's lands; and they also carried interest. Previously
1897. only such judgments as were for a penal sum to cover interest
M'DONNELL carried it. Thenceforth, at any rate, interest upon judgments in
v. Ireland would come within the narrowest view of the 42nd section
FITZGERALD. of the 3 & 4 Wm. 4: though no doubt there would be very great
difficulty in holding that if judgments were not within that section
of the Act when it passed, they could be, without express words,
brought within it by subsequent enactments altering their quality
and incidents. But in *O'Kelly v. Bodkin* (1) stress was laid upon
the language of the section, which applies to interest . . . not
merely charged upon, but "payable out of" land; and as a
debtor's lands could be made available for payment of his judg-
ment debts, apart from any charge imposed by the 3 & 4 Vict. c. 105,
by virtue of the writ of *elegit*, it was the opinion of the Court that all
judgments came within the 42nd section. Brady, C.B., says,
at page 402:—"It has not been contended in argument that a
sum of money secured by judgment does not fall directly within
the legislation of the 40th section; and I cannot conceive language
more express and unequivocal to denote that the Legislature, in
this section at least, considered a sum so secured as being a sum
charged upon or payable out of land, than 'secured by any mort-
gage, judgment, or lien, or otherwise charged upon or payable out
of any land.' I cannot read those words in any other sense;
and I believe it never has been contended that in this section at
least the Legislature did not so use or understand them. Now
when we find this identical form of expression used in two sections
of the same Act of Parliament—two sections so nearly connected as
well in point of location in the Act as in the subject-matter of
their provisions, I think, in accordance with the rule of interpre-
tation I have stated, we are fully entitled to call the one section in
aid of any doubt or uncertainty that may exist in the other; and
having it, therefore, I may say, declared by the 40th section,
almost in express terms, that a sum of money secured by judgment
is a sum charged upon or payable out of land within the meaning
of the Legislature, we may fairly consider the same words when
used in the 42nd section, as having a meaning as comprehensive as
that recognised to belong to them in the 40th section, and consequently

to comprise a sum secured by judgment, so far at least as that section may properly apply to a sum so secured." And again, at page 403 :—"I may here observe that the words of the Act before us are not merely 'a sum of money charged upon,' but a sum of money 'charged upon or payable out of any land,' words which appear to import that the Legislature did not merely regard cases of express charge, such as mortgages, portions, legacies or charges of the like nature, but generally all sums of money the payment of which could be enforced against land by means of the security given by the party by whom it was payable; and, therefore, even if the expressions I have quoted as to the general nature of a judgment debt and its character as a charge or lien on land were more equivocal than they are, the construction of the particular Act before us would not, I apprehend, be seriously affected." And at page 407:—"That a sum of money secured by judgment may therefore be considered, without any impropriety of expression, as a sum charged upon or payable out of land, I think the authorities I have referred to sufficiently establish. That it is so considered in the Act before us, is apparent from the 40th section; and I cannot hold that it was not so considered, and intended to be dealt with, when the same words are used in the 42nd section, unless I find that the section is wholly inapplicable to such a case, or that, from some inherent condition in the security itself, or some settled principle of law, the section cannot be so understood without necessarily producing inconsistencies and anomalies irreconcilable with such interpretation."

And Pennefather, B., at page 411, says :—"Suppose a mortgage is executed, and a judgment in a penal sum is confessed to secure payment of one and the same debt, with interest. By the express words of the Act, six years' interest only can be levied out of the land by means of the mortgage; yet, according to the construction contended for, twenty years' interest upon the same debt might be levied out of the same land by means of the judgment. That would, indeed, be anomalous; to hold that on one and the same transaction, and in the case of securities passed at the same time, and affecting the same subject-matter, six years' interest only was recoverable by the one and twenty years' by the other."

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In *Henry v. Smith* (1), Lord St. Leonards says at p. 504 :—
 “There is no doubt of this, that as a mortgage is an actual charge upon land, a judgment is a potential charge, and is capable of being made an actual charge. The judgment creditor has a right to resort to the land for payment of his debt; and by adopting certain proceedings he can make his judgment an actual charge upon the land, and the owner of the land cannot, by any possible means, defeat that right of the judgment creditor to come against the land for payment of his debt. I need not therefore consider whether a judgment be a lien or charge upon land. Under the late Act of the Queen it is made an actual charge. That was discussed here in another case, but decided by me with the concurrence of able assistants: see *Rolleston v. Morton* (2). But, independently of that Act, it is at any rate a potential charge, and it may be made an actual charge at the volition of the judgment creditor. Is there, I would ask, the slightest doubt that a judgment is an incumbrance upon real estate? Every one in practice would say, without hesitation, that it is an incumbrance; and the proof of it is that on every purchase the first search that is made is for judgments against the vendor; and no one will complete his purchase until all the judgments are satisfied.” And, again, at p. 506, “That 42nd section says :—‘That no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of any such arrears of rent or interest shall be recovered, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.’ I am at a loss to conceive what difficulty there can be in applying those words to judgments. I do not know how it would be possible to use more proper words if it were intended to include them. If the word ‘judgment’ which is in the 40th section, be left out, the same may be said of the word ‘mortgage’; the Legislature considered it unnecessary to repeat either, but they speak of the principal sum of money in respect of which the interest accrues, and

(1) 4 Ir. Eq. R. 502.

(2) *Ibid.* 149.

they use the common drag-net words, 'charged upon or payable out of any land or rent,' which are quite sufficient to include the case of a judgment; and it appears to me completely to dispose of the question."

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It is therefore not too much to say that until the passing of the Judgment Mortgage Act, 13 & 14 Vict. c. 29, no interest beyond six years could be recovered upon a judgment, whether actually charged upon land or not. Indeed, if this had not been so, apparently there would have been no period of limitation whatever applicable to such interest; for interest is not within section 40, and the Act 3 & 4 Wm. 4, c. 42, does not extend to Ireland.

The Judgment Mortgage Act again altered the character and incidents of judgments as related to land. That Act abolished in the case of judgments under its provisions both the common law and statutory right to *elegit*, and also the equitable charge conferred by Pigot's Act; and enabled the judgment creditor by making and filing an affidavit to become actual mortgagee of the debtor's interest in any specified lands over which he had a disposing power. If it were necessary to decide it, I should be prepared to hold that a judgment under this Act is as much a charge upon land as was a judgment prior to Pigot's Act, that is, that it is as much a hovering or potential lien. In the one case, to make it an actual charge a writ of *elegit* must be sued out, and the lands must be set out and extended. In the other, an affidavit must be filed before any actual charge is effected: and indeed in the Judgment Mortgage Act the lands are spoken of as not to be charged, &c., by the judgment, "save as provided by this Act" (section 1), and the effect of the judgment as against chattel interests, and the writ of *fi. fa.* (section 10), and also in the administration of assets in respect of interests in land (section 11) is preserved. In 21 & 22 Vict. c. 105, the registration under 13 & 14 Vict. c. 29 is spoken of as the registration of the judgment, and not of the affidavit (section 4).

But it is not necessary to discuss this, if s. 42 of 3 & 4 Wm. 4, c. 27, still applied to interest upon judgments as such, and apart from whether they did or did not affect lands.

Then came, however, the Irish Common Law Procedure Act, 1853, s. 20, under which it is said all this is altered. It is probable

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that the early portion of this section was taken from the 3 & 4 Wm. 4, c. 42 s. 3, by some one who was not aware that that Act did not apply to Ireland. It does, however, expressly refer to "actions upon a judgment," and in *Breslin v. Hodgens* (1) the Vice-Chancellor decided that it applied to actions for interest upon judgments, thus making the period of limitation applicable to such interest twenty years. He says, p. 264 :—" But since the case of *Henry v. Smith* (2) was decided, the Irish Common Law Procedure Act has been passed, which materially affects the question. That Act, in section 20, provides *inter alia* that actions upon any judgment shall be commenced and sued within twenty years next after the recovery of the judgment. This is as to judgments an entirely new enactment; nothing corresponding to it is contained in 3 & 4 Wm. 4, c. 42, or in the 3 & 4 Vict. c. 105. But in other respects it corresponds with the 3rd section of the former and the 32nd section of the latter of these Acts, and consequently the decisions upon these sections must apply to it. The law seems now settled as to them, and the principle laid down is that both those sections, and consequently the 20th section of the Common Law Procedure Act, must be read with the 42nd section of the 3 & 4 Wm. 4, c. 27, and that the actions mentioned in them must be treated as excepted by them out of the operation of the 42nd section of that Act. The intention of the Legislature has been decided to be to provide the six years' limitation of the 42nd section for remedies against real estate, and to provide the twenty years' limitation in the other enactments for remedies against the debtor personally. Accordingly, a judgment creditor can now recover twenty years' arrears of interest in an action against a debtor, and in my opinion this is so, whether the judgment be in a penal sum or in case. But it is said that this proceeding is not an action upon the judgment, and that the statute applies to actions only." The Vice-Chancellor then proceeds to discuss this question, and comes to the conclusion that it applies to a claim in an administration suit.

That is a decision on the very point before me, so far as the present claim is concerned, because the arrears here claimed are

(1) I. R. 10 Eq. 260.

(2) 4 Ir. Eq. R. 502.

only for eight and a-half years, and therefore it would make no difference if, instead of the twenty years under the Common Law Procedure Act, twelve years were to be substituted by virtue of the Real Property Limitation Act of 1874. The question in each case would be the same, does section 42 of the Act of 1833 apply, or does it not?

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That it does apply unless it is repealed, I think I have shown. How and by what Act has it been repealed? If at all it must be by the Common Law Procedure Act. But that enactment does not purport to repeal it or (which is the same thing) to create any exception out of it.

The Vice-Chancellor speaks of the cases as having established the proposition that under the two Acts of 3 & 4 Wm. 4, c. 27, and c. 42, the latter must be dealt with as having established an exception out of section 42. I dare say the reference is to such cases as *Paget v. Foley* (1) and *Du Vigier v. Lee* (2); and *Strachan v. Thomas* (3) was cited as well as *Hunter v. Nockolds* (4), the argument being that whatever be the limitation of the right to recover interest out of lands, the limitation where a personal remedy only is pursued is twenty years. Do these cases govern the present?

Breslin v. Hodgins (5) was before *Sutton v. Sutton* (6) and *Fearnside v. Flint* (7). It was also before *Evans v. O'Donnell* (8) in the Court of Appeal. These cases all turned, not upon section 42 of the Act of 1833, but upon section 8 of the Act of 1874, which is however similar to section 40 in terms, except for the substitution of twelve years for twenty.

In *Sutton v. Sutton* (6), which was the case of a mortgage, it was decided that the personal remedy for recovery of principal money was cut down to twelve years, as well as the remedy against the land: and *Hunter v. Nockolds* (4) was distinguished by Cotton, L. J., p. 518. He says:—"One difficulty I have felt has been in consequence of the case of *Hunter v. Nockolds* (4) decided by Lord Cottenham, in which he expressed the opinion

(1) 2 Bing. (N. S.) 676.

(2) 2 Hare, 326.

(3) 2 A. & E. 536.

(4) 1 M. & G. 640.

(5) I. R. 10 Eq. 260.

(6) 22 Ch. D. 511.

(7) *Ibid.* 579.

(8) 18 L. R. Ir. 170.

M. R. that although in actions brought to recover money issuing out of
1897. the lands, only six years' interest could be allowed, yet he based
M'DONNELL his decision upon this ground, that one must take the two
v. statutes 3 & 4 Wm. 4, c. 27, and 3 & 4 Wm. 4, c. 42, together.
FITZGERALD. That might be right under the circumstances. He was driven
to that by this consideration, that the one Act was only passed
three weeks before the other, and therefore, he said, you must
read the two together, and take the later one only as an
explanation of the other Act. I think we are not in any such
difficulty here, because the section we have to construe is contained
in an Act passed in the year 1874, and therefore there is no
necessity for construing this, so as to leave the same bar to an
action on the covenant as that which is provided by section 42 of
the earlier Act. There is no necessity to follow in this case the
way in which Lord Cottenham dealt with the two Acts passed
almost simultaneously." *Fearnside v. Flint* (1) extended the same
principle and applied it, even where the covenant was in a separate
instrument from that which charged the lands.

Now if *Hunter v. Nockolds* (2) was distinguishable from *Sutton v. Sutton* (3) by the fact that in the former case the question arose upon two Acts of Parliament passed within a fortnight of each other, and so presumably to be read together, while in *Sutton v. Sutton* (3) it directly arose only upon an enactment in 1874, what shall we say of the present case, where the Act of 1833 (c. 27) alone applied to this country until, at any rate, 1853?

But indeed the point in respect of section 42 seems to me to be involved in the judgments in *Evans v. O'Donnell* (4), though that case was not directly conversant with section 42. If I did not think so I should have felt bound against my own opinion to follow *Breslin v. Hodgens* (5).

In *Evans v. O'Donnell* (4) the question was whether execution could be issued on a judgment where twelve years had elapsed without payment of interest or acknowledgment. The Court of Appeal held that the period of limitation applicable was

(1) 22 Ch. D. 579.

(4) 18 L. R. Ir. 170.

(2) 1 M'N. & G. 640.

(5) I. R. 10 Eq. 260.

(3) 22 Ch. D. 511.

the same, whether the judgment debtor had lands or not, and that the case was governed by the Act of 1874. Lord Ashbourne, C., there says, at page 171 :—"The plaintiff has argued that as the judgment here is not charged on land, it is outside the 37 & 38 Vict. c. 57. The 8th section of that Act is, save as to the period of limitation, the same as section 40 of 3 & 4 Wm. 4, c. 27, and the words used here were strongly relied on by the plaintiff :—"Any sum of money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent." The effect of judgments in relation to lands has varied much since the 3 & 4 Wm. 4, c. 27, was passed ; and the plaintiff has had to argue that the application of statutes of limitations has been largely affected by each such variation. The words of section 40 of the statute have, however, been held to include actions for the recovery of money secured by mortgage, and by covenants in deeds of mortgage : *Sutton v. Sutton* (1) ; and by bonds collateral to mortgages. In the case of *Watson v. Birch* (2), Vice-Chancellor Shadwell thus explained the 40th section :—"There is nothing in the word "judgment," as there used, to confine its meaning to a judgment which, owing to the nature of the assets of the party indebted, might affect land, but could not operate on personal estate. The intention of the Legislature was that no proceedings whatever should be taken on a judgment after the lapse of twenty years from the time the money secured became due.' The object of the Act was not exclusively to release lands after the specified period of limitation. It expressly embraced legacies, whether charged on real estate or not. I can see no principle to support any more limited construction. No reason has been suggested to show that there should be any distinction taken between different classes of judgments. It has not been shown that as a fact such different classes of judgments exist."

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Fitz Gibbon, L. J., says at page 173 :—"There would be something very startling in the conclusion that an Act passed in the reign of Wm. 4, in the very same terms as one passed in the year 1874—except only as to the number of years—had a totally different effect. It might, with more show of reason, have

(1) 22 Ch. D. 511.

(2) 15 Sim. 523.

M. R. been suggested originally that the Act of Wm. 4 applied to judgments which were actually charged on land at the time it was passed, but this point has been long since settled on the earlier
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FITZGERALD. Act, and the later Act in the same words must have the same construction. As soon as it is held that all the remedies for the debt, and not merely the particular security by judgment, are barred, it seems impossible to classify judgments into those charged upon lands and those not so charged; and we avoid all difficulties by holding that where the Act of Wm. 4 speaks of judgments as charged on lands, it means merely that they are capable of being put into operation against lands; and as this quality then attached to all judgments by one process, so it does now by another, namely, by registration; but whether the process of execution against lands has or has not been availed of, the Statute of Limitations runs against every judgment, and there is the same fixed period in all cases. This decision still leaves some safe ground for the application of the Common Law Procedure Act, while restricting it to 'actions' taken in the Courts to which that Act applied. The Vice-Chancellor seems to have acted on the same principle in *Breslin v. Hodgins* (1) as in *Sherwood v. Hannan* (2), but I am unable to adopt it."

Barry, L. J. concurred. He says, at p. 174:—"It seems to me that the decision of the Vice-Chancellor proceeded expressly upon the force and effect which he attributed to the 20th section of the Common Law Procedure Act of 1853. No doubt the able draughtsman who prepared that Act had good ground for inserting that clause in it, still its insertion shows me the great expediency of introducing into Acts for Ireland small differences from the corresponding law in England, and in the event of subsequent legislation, common to both countries, the system leads to confusion and perplexity. I think the difficulty has arisen in this case from the misapplication of that 20th section by the Vice-Chancellor. I wish to guard myself against being supposed to suggest that it would enable a party to bring an action on a judgment within twenty years, or that the section was not impliedly repealed by the Act of 1874."

(1) 1 I. R. 10 Eq. 260.

(2) 15 L. R. Ir 334.

If section 42 includes interest upon all the securities mentioned in section 40, and if section 40 includes judgments, whether charged upon lands or not, and whether the remedy adopted is one against lands or under the personal liability, and if section 20 of the Common Law Procedure Act must be treated as repealed by the Act of 1874, or at least as being so far controlled by it in reference to judgments, as to be no longer applicable even to personal remedies for the principal money—except (if at all) where the judgment is sued on in a fresh action—it seems impossible to hold that the remedy for interest upon the same judgment can be by the same section extended from six to twenty years. I am clearly of opinion that section 42 of 3 & 4 Wm. 4, c. 27, still applies, and that it governs this case.

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Solicitor for the defendant: *Samuel Hemphill*.

Solicitors for the Munster and Leinster Bank: *D. & T. Fitzgerald*.

W. L.

IN RE MALONE, DECEASED.

BROWNE v. MALONE.

(1895. No. 242.)

M. R.

1897.

April 26.
May 3.

Will—Legacy to wife—Deficiency of assets—Priority—Intention of testator—Construction of will.

By his will a testator gave and bequeathed to his wife “the sum of £5000 to be paid to her out of my estate,” and he appointed her and another executors. After certain specific devises and bequests, the testator provided as follows:—“Out of the rest, residue, and remainder of my property I give, devise, and bequeath the following legacies,” and then followed a number of bequests of money to certain persons. He appointed his wife residuary legatee. In the administration of the personal estate of the deceased by the Court the assets proved insufficient for the payment of all the legacies in full:—

Held, that the legacy of £5000 to the testator's wife was entitled to priority of payment over the other pecuniary legacies bequeathed by the will.

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FURTHER CONSIDERATION.

By his will dated 11th August, 1891, James Malone gave and bequeathed to his wife Kate Malone "the sum of £5000 to be paid to her out of my estate." He then devised and bequeathed to his said wife, for her sole and absolute use, his interest in certain house property and chattels, and appointed her and his nephew George Malone, executrix and executor of his will. He then devised his interest in certain other house property to his said executors upon certain trusts. After some other specific devises and bequests, the testator provided as follows:—"Out of the rest, residue, and remainder of my property, I give, devise, and bequeath the following legacies"—and then followed a number of pecuniary legacies, in favour of certain persons, including a legacy to the plaintiff of £250. He desired that all said legacies should be paid free of legacy duty, and he appointed his wife residuary legatee.

The testator died 23rd February, 1894, and probate of his will was granted to the widow Kate Malone, one of the executors therein named.

On the 28th March, 1895, an originating summons was taken out by the plaintiff against the executrix, Mrs. Malone, for the administration of the personal estate of the deceased. The personal estate proved insufficient to pay all the legacies in full.

Corvan, for the plaintiff:—

The assets being insufficient to discharge the several pecuniary legacies in full, they must all abate rateably. The *onus* lies on the party seeking priority. The testator is to be taken as intending equality, unless a contrary intention is shown by the terms of the will. No such contrary intention is here shown. *Oppenheim v. Schneider* (1), strongly supports our contention. It follows the decision in *Blower v. Morret* (2), in preference to *Re Hardy* (3). See also *Roche v. Harding* (4).

(1) [1891] 3 Ch. 44.

(2) 2 Ves. Sen. 420.

(3) 17 Ch. D. 798.

(4) 7 Ir. Ch. R. 338.

Wakely, for the defendant Mrs. Malone :—

The legacy of £5000 to the widow has priority over all legacies payable out of the residue.

In every case it is a question of intention, which is to be collected from the frame of the will. This legacy is charged on all the testator's estate. It is coupled with specific devises and bequests which are to take effect immediately. And then out of the "rest, residue, and remainder" of the property the other pecuniary legacies are to be paid. The use of these words does not show that the testator thought that he had personal estate sufficient to meet all the legacies bequeathed by him. On the fair construction of the words of this will the testator manifests an intention to give priority to the legacy given to his widow, and that is sufficient to enable the Court to carry the intention into effect: *Williams on Executors*, 1221; *Lewin v. Lewin* (1); *Re Hardy* (2).

Roche v. Harding (3), does not affect this principle, and is distinguishable from the present case. The direction that a legacy given to the executor should be paid and retained by him "in the first instance, without any delay or deduction," was held not to be evidence of an intention to give priority to the legacy, because it only marked the order in which it occurred to the testatrix to give the directions to her executor. Such was the interpretation given to the words of that particular will by the then Master of the Rolls, and that was the ground of his decision: see judgment in the case (p. 342). But the words of this will are very different from those used in *Roche v. Harding* (3).

The authorities, perhaps, show that such expressions as those directing *immediate* payment, or payment "in the next place after debts," or "out of the first money got in," do not *per se* show an intention to give priority. But the point is, that when, from the whole of the will, an intention to give priority can be fairly gathered, it is sufficient.

In *Oppenheim v. Schweder* (4), Chitty, J., came to the conclusion that the testator certainly intended that there should be equality among the legatees: see judgment at page 46.

(1) 2 Ves. Sen. 415.

(2) 17 Ch. D. 798.

(3) 7 Ir. Ch. 338.

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THE MASTER OF THE ROLLS :—

The rule is so clearly settled by a long series of decisions from the time of Lord Hardwicke down, that one pecuniary legacy cannot acquire priority over other legacies of similar character by doubtful expressions, that I was at first disposed to hold that the legacy to the defendant Mrs. Malone must abate rateably with the rest. The circumstance that one legacy is to be paid first—or in the first place—or the like, is no sufficient indication that it is to have priority over the rest ; because a testator is presumed to suppose that his assets will be adequate to meet all the dispositions he makes ; and thus such expressions do not show that he contemplates a possible deficiency. They refer merely to the order of time in which the testator desires payment to take place. Further, the fact that the legatee is his wife makes no difference, although it was once thought that it did. The intention to be gathered from the words used is the guide. I need not do more than refer to these well-settled principles ; and the cases of *Brown v. Brown* (1) ; *Gyett v. Williams* (2) ; *Pepper v. Bloomfield* (3) ; *Beeston v. Booth* (4) ; *Miller v. Huddlestone* (5) ; *Thwaites v. Foreman* (6) ; *Oppenheim v. Schweder* (7) ; *Roche v. Harding* (8).

But while this is so, and while in the present case no doubt the *onus* lies on the defendant of showing that her legacy was meant to have priority over the other pecuniary legacies, it is to be observed that her legacy is charged upon all the testator's estate. *Prima facie* that means his real and personal estate ; but I cannot decide that in this suit, which is conversant with personal estate alone. The charge, however, is in terms upon all the personal estate at least. The other legacies are payable out of the "rest, residue, and remainder" of his property, after the gift of the £5000 and certain specific devises and bequests. In my opinion, apart from authority, this indicates clearly that the subsequent legacies are to be payable out of what remains after satisfying (*inter alia*) the £5000. And I think that for this proposition authority is to be found in *Beeston v. Booth* (4), at the end of the judgment,

(1) 1 Keen, 275.

(2) 2 J. & H. 429 ; see p. 440.

(3) 3 Dr. & W. 499, 506.

(4) 4 Mad. 161, at p. 170.

(5) 3 M'N. & G. 513.

(6) 1 Coll. Ch. 409.

(7) [1891] 3 Ch. 44.

(8) 7 Ir. Ch. R. 338.

and in *Brown v. Brown* (1); *Gyett v. Williams* (2); and in *Pepper v. Bloomfield* (3).

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The argument derived from this legacy being charged in the way I have mentioned is not weakened at any rate by the circumstance that it is a gift in favour of the testator's wife, though that consideration alone would not suffice without more.

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Declare the £5000 legacy to the defendant entitled to priority over the other pecuniary legacies left by the testator: the latter to abate, *inter se*, the assets being insufficient to pay all in full.

Solicitor for the plaintiff: *Thos. Healy*.

Solicitor for the defendant: *J. Sinnott*.

R. W. L.

IN RE WHELAN, DECEASED.

V. C.
1897.

DODD *v.* WHELAN.

June 3, 18.

Continuing guarantee—Knowledge of guarantor's death—Revocation.

W. guaranteed the current account of W. & M. (a partnership of which W. was a member) at a bank by a letter, which provided that the guarantee was to be a continuing one "notwithstanding any changes in the partnership of W. & M." W. died on the 12th April, 1895. No notice of W.'s death was given to the bank. In November, 1895, the bank manager heard in conversation that W. was dead. The bank discounted bills for the partnership after the death of W. and down to the 31st December, 1895, when the account was closed, and sought to make his estate liable on the guarantee, the firm being insolvent:—

Held, that knowledge of the guarantor's death was sufficient to put the bank on inquiry whether there was any authority to continue the previous course of dealing, and that the guarantee was determined on the date when the bank first had knowledge of the guarantor's death.

ADJOURNED SUMMONS.

The Bank of Liverpool, Limited, claimed to be creditors on the estate of the deceased John Nolan Whelan, in respect of three

(1) 1 Keen, 275. (2) 2 J. & H. 429. (3) 3 Dr. & W. 499, 506.

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bills for £2000 each, which had been discounted by them in April and May, 1895, after Whelan's death, and also for advances made in December, 1895, for the firm of Whelan & Maher, in which the deceased had been a partner, and which was admittedly insolvent. No notice of Whelan's death had been given to the Bank, but it was admitted that in November, 1895, the bank manager had heard, in a conversation with a stranger, that the guarantor was dead. The claimants relied on a letter of guarantee dated 25th March, 1891, given to them by the deceased, which stated "This is to be a continuing guarantee, notwithstanding any changes in the partnership of Whelan & Maher."

The Chief Clerk ruled that the guarantee ceased on the death of Whelan on 12th April, 1895, and the questions submitted for decision of the Judge, were—1. Did the guarantee continue to the closing of the account on 1st January, 1896? 2. If not, did the guarantee determine at the death of Whelan or upon notice of his death?

Matheson, Q.C. and *Sheil*, for the claimants:—

In no case has it been held that the mere fact of the death of the guarantor, unknown to the person guaranteed, determines the liability on a continuing guarantee. Notice of the death is necessary: *Coulthart v. Clementson* (1); *De Colyar on Guarantees*, 3rd Ed. p. 392. There is nothing in the terms of this guarantee to limit the liability to Whelan's lifetime. It is an ordinary continuing guarantee. It is not revoked by death: *In re Sherry* (2). There must be actual or constructive notice. Information acquired in a casual conversation is not enough: *Harriss v. Fawcett* (3), *Bradbury v. Morgan* (4); and it is doubtful whether notice of death determines the liability: *Beckett v. Addyman* (5). In *In re Silvester* (6), the guarantee contained the word "representatives." It is not necessary to contend that notice of death would not determine the guarantee, because admittedly we got no formal notice until after the account had been closed by the bank on 31st December, 1895.

(1) 5 Q. B. D. 42.

(2) 25 Ch. D. 692.

(3) L. R. 8 Ch. App. 866.

(4) 1 H. & C. 249.

(5) 9 Q. B. D. 783.

(6) [1895] 1 Ch. 573.

Meredith, Q.C., and *E. A. Ennis*, for the personal representative of Whelan:—

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1897.

In re Silvester (1) shows that knowledge of the death of the guarantor is sufficient to determine the liability, and in *Harriss v. Fawcett* (2) Mellish, L.J., says, the Bank were not aware of the death of the guarantor (Williams on Executors, 9th Edition, p. 1660; De Colyar on Guarantees, 3rd Ed., p. 394). *Beckett v. Addyman* (3) has no application. It decides that one co-surety is not released by the death of another.

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This is a guarantee by a member of a firm of the firm's debt. It is the first case in which the surety was himself also a debtor. While he was alive he could control the business of the firm and thus limit his own liability. Every word of the guarantee points to personal liability.

THE VICE-CHANCELLOR:—

June 16.

This is a claim made by the Bank of Liverpool, to be allowed as creditors of the deceased, whose assets are being now administered, on foot of a guarantee given by him for the balances to be from time to time due to the Bank by the firm of Whelan & Maher. There is no question as to the liability of the deceased as guarantor for the portion of the claim of the Bank which was due by Whelan & Maher at his death, but the executors of Whelan dispute their liability to any portion of the claim which is for advances to the firm after the death of the testator, or if this be too extensive, to the portion of the claim which was for advances since the Bank had knowledge of his death. They contend that it is not necessary to prove any formal notice given to the Bank of the death, or of the intention to terminate the guarantee as to future advances.

I do not think that, having regard to the decision of the Court of Exchequer in *Bradbury v. Morgan* (4), and the cases which have followed it, I can hold that the mere fact of the death of the guarantor, unknown to the creditor, terminated the operation of the guarantee. But the question arises whether mere knowledge

(1) [1895] 1 Ch. 573.

(3) 9 Q. B. D. 783.

(2) L. R. 8 Ch. App. 866.

(4) 1 H. & C. 249.

V.-C. of the death has that operation without formal notice being given
1897. by the executors to determine the guarantee. The nature of
Dodd such guarantees and the right to determine them was carefully
v. considered by Bowen, J., in the case of *Coulthart v. Clementson* (1),
WHELAN. an action which was tried by him on circuit, when he reserved the
case for his further consideration. It was argued before him
subsequently, and he again took time for consideration, so that the
questions there raised were fully deliberated on by that eminent
Judge, and his opinion is entitled to great weight. He put the
case as one of contract, and refers to the decision of the Court of
Common Pleas in *Offord v. Davies* (2), and held that it was estab-
lished by authority that such continuing guarantees can be with-
drawn on notice during the lifetime of the guarantor, and that a
limitation to that effect must be read, so to speak, into the contract.
He then proceeded to consider the question of what is to happen
on the death of the guarantor, and asks if the guarantee is then to
become irrevocable and to go on for ever? He replies, and I
think conclusively, that such a consequence of the death would be
absurd. In this conclusion I entirely agree. He then proceeds
to consider what notice should be deemed sufficient, and asks must
the executor give special notice that the guarantee is withdrawn,
or is it not enough that the creditor should be warned of the death
of the guarantor and the devolution of his estate to others, and
holds that, in the absence of special option to the personal represen-
tative to continue the guarantee, the notice of the death of the
testator and of the existence of a will is constructive notice of the
determination of the guarantee as to future advances. These
words cannot be limited to cases where a will exists, and are *a*
fortiori applicable to cases of intestacy, for such an option could
only be given by a will, and if no will exists no such option can
exist. In the absence of express authority from the deceased,
whether he dies intestate or makes a will not giving such option,
it would be equally outside the duty of the executor or of the
administrator, as the case may be, to continue the course of dealing.
Knowledge of the death therefore is, as considered by Bowen, J.,
sufficient to put the creditor on inquiry whether there is any

(1) 5 Q. B. D. 42.

(2) 12 C. B. (N. S.) 748.

testamentary authority before making further advances. Nor is there any hardship upon or injustice to the creditor in so holding. His knowledge of the death should be enough to require him to hold his hand, and ascertain whether or not there is any option given to the personal representatives of the guarantor to continue the course of dealing, or rather to enter into a new contract of suretyship. The decision in *Coulthart v. Clementson* (1) is clear, that in case no such option exists, the course of dealing is determined by knowledge of the death.

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The opinion of Mellish, L.J., in *Harriss v. Fawcett* (2), a case referred to, not on this part of the question, by Bowen, J., in *Coulthart v. Clementson* (1), is quite in accordance with his views.

The case of *Coulthart v. Clementson* (1), was commented on by Romer, J., in *In re Silvester* (3); but I cannot regard the *dicta* of the learned Judge as sufficient to displace the decision of Bowen, J., which was not appealed from and which I am prepared to follow. Of course, in the case of express provisions in the contract of guarantee, effect must be given to them, according to the true construction of the instrument; but there is not, in my opinion, anything in this letter of guarantee bearing upon the present question.

I therefore hold that advances made by the Bank subsequent to their having knowledge of the death of the testator are not covered by the guarantee, but that those made prior to this were so covered.

The evidence of the time at which the Bank first knew of the testator's death is not satisfactory, and consists of the admission of their principal officer that he knew of it, in either November or December, 1895. I shall therefore assume the date of the 1st December, 1895, as the time.

The claimants to have their costs with their demand.

Solicitors for the claimants: *D. & T. Fitzgerald.*

Solicitors for the executor: *Ennis & Son.*

T. H. M.

(1) 5 Q. B. D. 42. (2) L. R. 8 Ch.App. 866. (3) [1895] 1 Ch. 573.

V.-C.
1897.

April 28.
May 17.

OWEN v. OWEN AND SCHOMBERGER.

(1896. No. 770.)

Settlement—Devise—Conversion.

Marriage articles included a policy of assurance, and declared the trusts upon which the policy was to be held in the usual manner. The ultimate trust, which took effect, was for the husband, his executors, administrators, and assigns. By the same articles, the mother of the intended wife covenanted to devise one-eighth of her lands which were held in fee simple, or a rentcharge, or a gross sum of money equivalent thereto, to the trustees, their heirs, executors, administrators, and assigns, upon trust to invest and re-invest the same if they should so think fit, and to hold the said share upon the same trusts as were declared of the policy, or such of them as should be applicable thereto. The mother subsequently devised one-eighth of the lands to her daughter, and directed the trustees to convey it. This was not done. The husband survived the wife:—

Held, that there was no conversion of the lands, and that accordingly they passed to the heir-at-law of the wife.

ACTION claiming a declaration that the plaintiff William J. Owen, as heir-at-law of Sarah Saphir, otherwise Owen, deceased, was entitled to one undivided eighth part of certain freehold lands situate in the Queen's County, and to one-eighth of the rents and profits of said lands. The defendant Arthur J. Owen had been in receipt of the rents and profits of the said lands, and in his defence stated that he believed the plaintiff's claim to be well founded, but that the defendant Johanna Schomberger also claimed the said one-eighth of the lands, and stated his willingness at all times to account for the rents and profits received by him. The defendant Johanna Schomberger claimed the undivided eighth of said lands, as personal representative of her mother Sarah Saphir, and also as personal representative of her father Adolph Saphir.

The facts were as follows:—

Sarah Saphir was one of the eight children of Elizabeth Owen. She married Adolph Saphir, and articles of agreement, dated the 22nd of June, 1854, on her marriage, were executed

between Adolph Saphir of the first part, Elizabeth Owen of the second part, Sarah Owen of the third part, and two trustees therein named of the fourth part, by which it was agreed that a policy of insurance for £1000, to be effected on the life of Adolph Saphir, in the names of the trustees, and the moneys thereby secured, should be vested in the trustees upon trust to call in and invest the same on such securities as they should think fit, and from time to time to re-invest the same in the same manner, and to pay the annual proceeds thereof to Sarah Owen for life, and after her death, if there should be a child or children of the marriage, to stand possessed of the said principal sum and securities upon which the same might be invested for such child or children in such shares, and payable as and when the husband and wife should jointly appoint, and in default of such appointment as the husband should appoint, and in default as the wife should appoint, and in default of appointment then for such child or children as therein mentioned, with power of advancement, and in case there should be no child who should attain 21, or be married if a daughter, then that the trustees should stand possessed of the said sum of £1000 for the said Sarah Owen, her executors, administrators, or assigns. The articles contained a covenant by Elizabeth Owen with the trustees, their executors, administrators, and assigns, and also with said Adolph Saphir, his heirs and assigns, that in case Sarah Owen should be living at the death of Elizabeth, or there should be any child or children of the marriage living at the death of Elizabeth, she should by will devise or bequeath to the trustees, their heirs, executors, administrators, and assigns, a share not less in amount than one-eighth of certain property called Moyne Parkaluse Kildinna Graigue, in Ossory, Scayle, and lands at Rathdanny, to which the said Elizabeth was then entitled. And it was thereby agreed that the share so devised or bequeathed, whether a rent-charge, or a specific portion of said lands, or a gross sum of money, or a charge on said lands, should be held by the trustees, their heirs, executors, administrators, and assigns, upon trust to invest and re-invest the same, if they should so think fit, and in such manner as should seem best to them, but with the consent in writing of the husband during his life, and the wife after his death, and to pay the annual proceeds thereof to the husband for

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V.-C. life, or till his bankruptcy, &c., and after his death or bankruptcy, &c.
 1897. to the wife for her separate use for life, and after the death of the
OWEN wife to hold the said share so to be devised as aforesaid upon the
 2. same trusts as thereinbefore agreed concerning the said sum of
OWEN. £1000, or such of them as were applicable thereto.

There were no children of the marriage.

Elizabeth Owen made her will dated the 31st January, 1856, by which she bequeathed all her personal property to her daughters who were unmarried at her death. She then gave and devised all her other property of every other kind to her three sons and their heirs, upon trust to pay the head-rents and other necessary outgoings, and then, subject to her debts, to divide as nearly as they could in the exercise of their judgment and discretion, into eight equal parts, and to hold the same in trust for her children (naming them), and in the discretion of her said trustees either to convey to her said eight children, or any of them, any portion or portions of said property, or an equivalent for their said shares in money; and, if they should think proper, to partition or divide the said property for such purposes, with power to sell or mortgage for payment of her debts, or for the purpose of giving to any of her eight children their shares; and the will then provided that the shares of her daughters Elizabeth and Sarah should be conveyed or paid to the trustees of their marriage settlements respectively.

The testatrix died in the year 1866, leaving her eight children surviving. After her death the income of the property so devised and bequeathed to them was paid to them in equal shares by the trustees of her will. No conveyance was executed of Mrs. Saphir's one-eighth to the trustees of the marriage articles. Mrs. Saphir died in the year 1891, intestate, and there were no children of the marriage. Her husband died a few days after her, having made a will leaving everything to his wife; but this gift lapsed, and administration to his personal estate was granted to the defendant Sarah Schomberger, who was also personal representative of Mrs. Saphir.

Ronan, Q.C., and D. F. Browne, for the plaintiff:—

This is an executory agreement, and the Court will order a conveyance or settlement to be made in a proper and legal manner

so as to best carry out the intention of the parties: Elphinstone on Deeds, pp. 535 and 539. A fee-simple may be limited by reference, *ib.* 227. The trustees have a discretion as to sale. *Minors v. Battison* (1) is distinguishable: there the discretion was only as to the mode of sale. A direction to sell must be express and imperative to work a conversion: *Fletcher v. Ashburner* (2); *Hyett v. Mekin* (3).

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Gordon, Q.C., and *Dixon*, for the defendant Sarah Schomberger:—

The first trust upon which the share to be devised or bequeathed by Elizabeth Owen was given was to invest the same. That impliedly directed a sale of the share of land: *Affleck v. James* (4); *Mower v. Orr* (5); *Cornick v. Pearce* (6). The trustees have a discretion, no doubt, but only as to the mode or manner of sale: *Minors v. Battison* (1). The trust for sale being imperative the share of the land devised by the will must be taken as converted. The whole scheme of the document shows an intention that the settled property was to be treated as personalty. There is no conveyance of the lands to the trustees. There is a covenant to devise to them, that is, to give them the legal estate for the purposes of the sale directed, and they are to hold the share upon the same trusts as a sum of money to be received under a policy of assurance, and to be held for the intended wife, her executors, administrators, and assigns. The phrase “or such of them as are applicable thereto” does not mean such trusts as are applicable to land, but such trusts as should be applicable in point of time in the events that might happen. The consent of the intended husband was only necessary for varying the investments. The word “proceeds” is used, not “rents,” in giving the life estate.

THE VICE-CHANCELLOR:—

The question raised for decision in this action is between the plaintiff, as heir-at-law of Sarah Saphir, and the defendant Johanna Schomberger, as her personal representative, and also as personal representative of her husband, Adolph Saphir. The subject matter in dispute is one-eighth undivided share of certain

May 17.

(1) 1 App. Cas. 428.

(4) 17 Sim. 121.

(2) 1 W. & T. L. C. 327.

(5) 7 Hare, 473, at p. 475.

(3) 25 Ch. D. 735.

(6) *Ibid.* 477.

V.-C. lands of which Elizabeth Owen, mother of Sarah Saphir, died seised.
 1897. [His Lordship stated the facts as above set-out and continued as follows :—]

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Mrs. Schomberger now claims the one-eighth share of Mrs. Saphir, as being personal estate to which her husband became entitled in his marital right. She contends that there was a conversion of the real estate by the conjoint operation of the articles and the will of Elizabeth Owen, and that in the events which have happened it became absolutely vested as personal estate in Mrs. Saphir. Conversion from realty to personalty, or from personalty to realty, is not to be held to have taken place without clear proof that it was intended to change the nature of the property. In default of such proof the property must be dealt with as in its existing condition. The doctrine depends on the fundamental principle that equity deems that to have been done which ought to have been done. In the present case the property remains in its original state, and is still in fact real estate. It was not conveyed to the trustees of the articles, and the legal estate is still in the trustees of Mrs. Owen's will. That will, however, cannot operate upon the nature of the property devised by it, as it was not by it that the trusts affecting it were declared. The trusts upon which it must be dealt with are those declared by the marriage articles. As far as regards the will, it could not be contended that any conversion was thereby effected, as the powers of the trustees of it, supposing they applied, were entirely discretionary, and as it contemplated a continuance of the property in specie. Her will did not, in terms, satisfy the covenant in the articles, as it did not convey the share of Sarah to the trustees of the articles, and as it purported to clothe the gift with certain terms different from those of the articles. It was, however, intended by the testatrix as a fulfilment of her covenant, and it has been so dealt with by the parties.

The articles are framed in a very inconvenient manner. They begin by dealing with pure personal estate, and that, too, consisting of a sum secured by a policy of insurance on the life of the husband which could not come into possession till his death, and they declare trusts as to this which are in terms properly applicable to a money fund, concluding with a trust, in case there should not

be any child of the marriage who should take a vested interest, for the wife, her executors, administrators, and assigns. They then proceed to deal with the one-eighth share of lands, most, but not all of which are of freehold tenure, and which were to be devised or bequeathed to the trustees, their *heirs*, executors, administrators, and assigns, and were expressly treated by the articles as possibly being conveyed to them in their existing condition of real estate. The trustees, their *heirs*, executors, administrators, and assigns, were to hold the share of Sarah Owen so *devised* or bequeathed, whether a rentcharge or a specific portion of the lands, or a gross sum of money, or a charge on the lands, upon trust to invest or re-invest, if they should so think fit, *and* in such manner as should seem best to them, and to pay the annual proceeds thereof to the husband for life, or till his bankruptcy; and thereafter to the wife for life, and after her death to hold *the said share* so to be devised to them upon the same trusts as thereinbefore agreed concerning the said sum of £1000, or such of them as are applicable thereto. This clause shows that it was contemplated that Elizabeth Owen should have the option of devising or bequeathing this share either in the form of a rentcharge issuing out of the lands, or of a specific portion of the lands themselves, or of a gross sum of money, or of a charge on the lands. Thus it might come to the trustees either as real or personal estate as Elizabeth Owen should determine, and consequently the words applicable to real estate and those to personal estate came to be used together and in a very confused manner.

The defendant relies on the inapplicability of these trusts to real estate, and there is no doubt that they are so in a great measure, as they were framed in reference to a sum of money, and were unfortunately by reference applied to the real estate which was also contemplated as being thereby settled. This applicability was foreseen, and was attempted to be guarded against by the qualification "or such of them as are applicable thereto." I do not think that this had the desired effect, and it certainly leaves it still to be ascertained which of these trusts were so applicable. But still it appears to me to deprive the argument founded on the unsuitability of these trusts of much of its force. It was also relied on by the defendant that the articles contain, in express

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reference to the one-eighth share, a trust to invest and re-invest the same if they shall think fit, and in such manner as shall seem best to them; and it was contended that this necessarily involved a direction to the trustees to convert the real estate for the purpose of such investment. It was argued that the construction of this clause is to stop at the word "invest" and to apply both the following portions of the sentence, viz. "if they shall think fit," and "in such manner as shall seem best to them," to the nature of the investments which they were directed to make. I do not so construe the sentence; and I am of opinion that the words "if they shall think fit" apply to the fact of investment, and the words "in such manner as shall seem best to them" apply to the nature of such investments. I hold it to be a discretionary power to invest if they think fit, or to leave the property in its existing condition, if they do not think fit to invest it. This clearly would not be a direction or amount to a conversion, for it is not within the equitable maxim a thing which ought to have been done.

But then the question arises, what estate Sarah was to take in the real estate, supposing it was not converted, under the trust for her executors, administrators, and assigns. It was contended by the defendant that these articles operated not by way of contract, but by way of actual conveyance, that the trusts were executed, and not merely executory, and that as a fee cannot in a deed operating as a complete conveyance be held to pass without the word "heirs," she took no estate. But, as this would be fatal to the present claim of the defendant Mrs. Schomberger as well as to that of the plaintiff, this was only put forward in the nature of an *ad absurdum* argument, as it was perfectly clear that she was intended to take the entire estate in these lands in remainder after her and her husband's life estates, in the event of there being no child taking a vested interest. It was therefore strongly urged that the only way out of this was by holding that there was a conversion. This argument deserves full consideration, and I have had difficulty in coming to a conclusion on the point; but I am of opinion that it should not prevail. I am of opinion that these articles were executory and that this Court had power to mould the words of this trust according to what I consider to be the clear intention of the parties, without holding that there was a conversion. As I

have already observed, the words as applied to personal estate are apt and clear, and they were used and rightly used as to the money secured by the policy. The trusts of the one-eighth share were intended to follow the trusts of this money so far as applicable, and I hold this to mean that whatever interests the parties took in the money they were to take corresponding estates or interests in the realty. Therefore, as Sarah took in the events that happened an absolute interest in the money, she took an estate in fee in the real estate.

I therefore hold that the plaintiff is entitled, as heir-at-law of Sarah Saphir, to the share of the real estate devised to her by the will of Elizabeth Owen.

Solicitors for the plaintiff : *D. & T. Fitzgerald.*

Solicitors for the defendant Schomberger : *Hallowes & Hamilton.*

Solicitor for the defendant Owen : *Purefoy Poe.*

T. H. M.

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GREAT NORTHERN RAILWAY CO. v. M'ALISTER.

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Accommodation works—Level crossing—Agricultural user of land—Change of condition—Opening quarry—Traction engine—Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 68, 73.

Appeal.
June 26.

A level crossing was, pursuant to section 68 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), made over a railway which intersected lands used as an ordinary farm. The crossing was rarely used, and then only for farming purposes. Many years after the landowner opened a quarry, and sought to draw the stones by means of a traction engine and wagons over the crossing. The engine was nearly as broad as the gates of the crossing, and evidence was given that by reason of the situation of the railway, and the nature of the road approaching to the crossing, the latter was unsuitable for a traction engine, and that the user contemplated would involve danger to passing trains:—

Held, that the landowner was not entitled to use the crossing in the manner contemplated, and that he should be restrained by injunction from so doing.

V.-C. **ACTION by the Great Northern Railway Company (Ireland)**
 1897. for an injunction to restrain the defendant, his servants, and
GT. NORTHN. agents from driving traction engines and wagons on to the plain-
RAILWAY CO. tiffs' railway near Mountpleasant, in the county of Louth, and
v. from bringing such engines and wagons on to a level crossing on
M'ALISTER. the said railway.

By the Dublin and Belfast Junction and Navan Branch Railway Act, 1845 (8 & 9 Vict. c. cxxx., loc. and pers.), which incorporated the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), the Dublin and Belfast Junction Railway Company with a branch from Drogheda to Navan was incorporated, with power to construct a railway from Drogheda to Portadown, and for that purpose to acquire the necessary lands.

The railway was to run through the lands of Faughart Upper in the county of Louth, the property of Robert M'Alister; and he by deed dated the 9th September, 1846, in consideration of £50, conveyed to the Company part of the said lands containing 1A. 0R. 12P. Irish plantation measure, together with all ways, rights, and appurtenances thereto belonging, and all such estate, right, title, and interest in and to the same as he was, or should become seized or possessed of, or was by the said Act empowered to convey.

The part conveyed was high ground, and the Company made a cutting through same, and constructed their railway along it. The railway entered the said lands at the south-west corner thereof, ran in a somewhat north-easterly direction, and left them at about the centre of the northern boundary, separating much the larger portion of the land from the part on which M'Alister's house and farm buildings stood, and from communication with the road from Dundalk to Jonesborough which bounded the lands on the western side. The Company built a wooden bridge across the railway cutting, opposite M'Alister's house, and also constructed a level crossing a short distance south of the bridge, with gates on either side of the railway.

It did not appear how this level crossing came to be constructed, and there was no evidence of any agreement or arbitration or award in reference thereto. The character of the lands was that of an ordinary farm.

Under subsequent statutory powers, and ultimately by the Act 40 & 41 Vict. c. lxx. (loc. and pers.), the Company became amalgamated with others under the name of Great Northern Railway Company (Ireland).

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The estate of Robert M'Alister in the lands became vested in the defendant many years before action.

The Mountpleasant station on the plaintiffs' railway, which was the next station north of Dundalk, and about four miles from it, was at the northern side of the defendant's land. The level crossing was about 300 yards south of the station, and some 250 yards from the south-west corner of the defendant's land: it was cut through the banks of the cutting, the approaches to it coming down the slopes. The crossing was within the Mountpleasant distant signal, but it was not separately signalled. Most of the trains did not stop at Mountpleasant; they passed it at full speed; the block system was in use on the railway. There was a slight curve in the line from the station to the south-west corner of the defendant's land, and only portion of the level crossing was visible from the station. The railway had a fall towards the south. The road leading down from the defendant's buildings to the level crossing was curved, and on a steep gradient of 1 in $6\frac{2}{3}$. A vehicle approaching the crossing from that side could not be seen from the station. The width of the gates at the level crossing was about 10 feet. The gate-posts were an inch or two more apart. Up to 1891 the public road from Dundalk crossed the railway just outside the south-west corner of the defendant's lands by a level crossing: there was a day watchman and a night watchman at that crossing. About 1891 the road was diverted, and it was carried underneath the railway a little more to the south, and there was no further need of a watchman: the gradient of the road under the railway was 1 in 17.

The defendant, many years ago, used to take horses and carts across his level crossing. In later years he did not use it much, and for some fifteen or twenty years, or more, preceding 1895, he did not use it for any purpose. In about the year 1887, as the crossing was never used or kept in order, the Railway Company cut an open trench across it, at one side of the railway track, to carry

V.-C. off water; and from that time until 1895, the level crossing was
1897. practically impassable.

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M'ALISTER.* Some fourteen to eighteen years ago the defendant opened a quarry near the south-east corner of his land, which was there bounded by the land of a man named M'Neill. A private road ran through M'Neill's land to the public road from Dundalk to Newry. The defendant used to supply the Dundalk Town Commissioners with stones. About eighteen years ago he bought a traction engine and wagons. He used them for drawing the stones: these were brought from the quarry by M'Neill's road, and thence to the public road. When there was occasion to take the traction engine from the defendant's house to the quarry, it was driven by the public level crossing, and thence by the public roads to M'Neill's land. That was the only way to go by road from the defendant's house to the quarry; it involved a round of about two miles; to go from the quarry to Dundalk by M'Neill's land, it was not necessary to pass the defendant's house. The traction engine was never taken across the defendant's level crossing, or the bridge; the latter would not have been strong enough to bear the engine and a train of wagons. Traction engines constantly passed over the public crossing.

There was a hillock some 15 or 20 feet high on defendant's land, between the quarry and the railway; it was chiefly composed of rock. About 1895, the defendant determined to quarry the rock, remove the stones, and level the ground. In that year he informed the plaintiffs' district engineer that he proposed to quarry there; he said he intended to bring the traction engine over his level crossing. The engineer replied that the crossing was in a bad state of repair, and had not been used for twenty years, but that he would put it into repair: he did so as well as he could, closing the drain, but he communicated with his superiors; he did not give the defendant any permission to take the engine across. The plaintiffs thereupon gave notice to the defendant that they would not allow him to take the engine over the crossing; he, however, persisted. The plaintiffs put new locks on the gates, but the defendant broke the locks.

The plaintiffs gave evidence that there would be great danger

in allowing the traction engine and wagons to be taken over the level crossing. The wagons would not conform to the curve of the approach to it: the curve would not affect an ordinary farm cart, but it would a train of wagons. Moreover, the steep gradient made the approach most unsuitable for a traction engine; it was too steep even for farm carts. If the approach were straight, and not on a gradient, there would be no mechanical difficulty in driving a traction engine over the crossing. The defendant's engine was about 9 feet wide, and in addition to the objections from the nature of the approach, it would not be safe to permit such an engine to be used without having the crossing signalled, as the traction engine could not be seen at a sufficient distance. It would be necessary to erect special signalling apparatus to make it safe; it would block the traffic; this would also entail expense, not only in the construction, but in the working of the signals with electrical apparatus. The crossing was most unsuitable for a traction engine.

The defendant gave evidence that M'Neill objected early in 1896 to the traction engine going through his land; he prevented the defendant from taking it there; the defendant had taken the engine over the crossing two or three times: there was no difficulty in doing so, and no accident occurred. There was now no other way of getting into his land at the south side. The curve on the approach was not so great as to prevent the passage of the engine and wagons; the wagons would be empty going down; he experienced no difficulty from the curve. It could be lessened or the approach made straight quite easily. The engine could draw two wagons up the hill from the level crossing, but the defendant would use only one; when drawing stones previously he used to have three wagons; he had taken a stone-crusher over the crossing; the time occupied on that occasion from his house to the other side of the railway was a quarter of an hour:

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Campbell, Q.C. (with him *Meredith, Q.C.*, and *R. F. Harrison*),
for the plaintiffs:—

The defendant is not entitled to use the level crossing in the way he claims to do. The words in section 68 of the Railways

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Clauses Consolidation Act, 1845 (1), "as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made," show that it was only the interruption to the then ordinary and natural use of the lands that was intended to be made good by accommodation works. In the present case the lands were at the time used for agricultural purposes, and the level crossing was an equivalent for any interruption to their use for such purposes only. Further, the proviso to that section applies to the present case; and section 73 shows that the intention of the statute was that accommodation works were to be provided by the Company once and for all according to the then user of the lands, subject to this, that at any time within five years further or additional works might be called for: see *Colley v. London & North Western Railway Co.* (2). This is further indicated by section 71, which gives additional protection to the land-owner, and enables him, even after the lapse of five years, to construct further works at his own expense. The purport and effect of section 68 was considered in *The Queen v. Brown* (3), and the very point arising here was discussed in the judgments of the Court in that case: see especially the judgment of Shee, J., where he says (page 633):—"It is quite plain that the accommodation works which Justices are empowered to order under

(1) The following are portions of the statute:—

And with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows:—

LXVIII. The Company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say)—

Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof: also sufficient posts, rails, . . . : also all necessary arches, tunnels . . . : also proper watering-places for cattle . . . : Provided always, that the Company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make

ss. 68 and 69 of 8 Vict. c. 20 must relate to the present, not to the future use of the land. They are such as are 'necessary for the purpose of making good any interruptions caused by the railway to the use of the lands;' such works 'are to be made forthwith,' clearly referring to the present, not a possible future use of the land. Again, the kind of accommodation works meant is exemplified by 'watering places' for cattle. All this clearly shows that the accommodation works meant are only those that would be necessary during the time the land continues to be used for the same purposes as those to which it is applied at the time of the severance by the railway." In citing that case we place the present on the most favourable basis for the defendant, viz. that the level crossing was an accommodation work under section 68. If the case be regarded from the point of view of a right acquired by long user, the authorities are clear that the right would be confined to the user enjoyed: see *Wimbledon and Putney Commons Conservators v. Dixon* (1), and *Bradburn v. Morris* (2); and, if the defendant's case be based on a lost grant, the surrounding circumstances at the time of the execution of the grant are what would be looked to for the purpose of defining the right: *Cannon v. Villars* (3).

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The defendant may rely on *United Land Company v. Great*

any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid compensation instead of the making them.

LXXI. If any of the owners or occupiers of lands affected by such railway shall consider the accommodation works made by the Company or directed by such Justices to be made by the Company, insufficient for the commodious use of their respective lands, it shall be lawful for any such owner or occupier, at any time, at his own expense, to make such further works for that purpose as he shall think necessary, and as shall be agreed to by the Company, or, in case of difference, as shall be authorized by two Justices.

LXXIII. The Company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or, if no period be prescribed, after five years from the completion of the works, and the opening of the railway for public use.

(1) 1 Ch. D. 362.

(2) 3 Ch. D. 812.

(3) 8 Ch. D. 415.

V.-C. *Eastern Railway Company* (1), but that case depended on a section of a special Act, which provided that the Railway Company should construct such convenient communications across, over, or under the railway as should, in the judgment of the Commissioners for the time being of Woods, Forests, &c., be necessary for the convenient enjoyment and occupation of the lands of Her Majesty. The lands were crown lands, and the Commissioners were made the judges of the communications which they should require. The crossings made were 30 and 20 feet wide, and it was held that it was not intended that they should be used only for the purpose of such fortifications and works as were in existence at the time the Act was passed. That Act, though subsequent to the Railways Clauses Consolidation Act, 1845, did not incorporate section 68 of the latter statute, but contained a special provision in lieu thereof, on which the decision depended. That case does not govern the present: it does not purport to shake the authority of *The Queen v. Brown* (2).

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If the defendant be held entitled to use the level crossing in the way he claims to do, every farmer who has a crossing will be able to do likewise, with the result that not only will trains be frequently blocked, but the lives of passengers will be continually endangered.

Matheson, Q. C., and Henry, Q.C. (with them *Dickie*), for the defendant:—

Before the railway was constructed, Robert M'Alister was entitled to use his land as he pleased; the Company on running their railway through it became bound to make a crossing for his accommodation; and they cannot now restrict him in the use thereof. The plaintiffs' argument goes the length that the defendant can use his land only in the mode in which it was used in 1845 or 1846; that he cannot build on it, or improve it in any way, or use improved machinery, such as a threshing machine, in working it. A decision in the plaintiffs' favour would have very far reaching consequences; for example, in the case of a railway running near the sea, the owner of land outside the

(1) L. R. 10 Ch. 586.

(2) L. R. 2 Q. B. 630.

railway would be unable to build on it after the railway was constructed. The plaintiffs put the defendant's rights as to the crossing on a different basis from all other rights of way. If a general right of way is granted by deed the grantee has a right of user for any class of traffic that may subsequently arise. The case of *United Land Company v. Great Eastern Railway Company* (1) directly applies, and rules the present: see the judgment there of Malins, V.-C. (2), whose view was adopted by the Court of Appeal (1). The words in the Act in that case were stronger in favour of the Railway Company than those which apply here: and the original Act provided that no private buildings should be erected on the lands—a prohibition which was not removed by the subsequent statutes. The decision there was based entirely on the view that the crossings were constructed for all purposes for which the parties might have occasion at any time to use them. See the judgments of Malins, V.-C. (2), and of James and Mellish, L.JJ., in the Court of Appeal (1). See further, *Newcomen v. Coulson* (3) in which the decision of Malins, V.C., following *Dand v. Kingscote* (4) and *United Land Company v. Great Eastern Railway Company* (1), was affirmed on appeal. In *Norton v. London and North Western Railway Company* (5) the facts were different from those in the present case, but the decision in *United Land Company v. Great Eastern Railway Company* (1) was there recognised and applied. See further, *Finch v. Great Western Railway Company* (6); also *Mayor of New Windsor v. Stovell* (7), which bears on the present case in this, that there North, J., also cites with approval *United Land Company v. Great Eastern Railway Company* (1) and *Newcomen v. Coulson* (3) and applies the principles there laid down. The foregoing cases are authorities to show that the defendant is entitled to use the level crossing for any of the purposes which modern improvements render desirable: he is not obliged to stand still, and not develop the resources of his land. *Dand v. Kingscote* (4) shows that if the words of a grant of a right of way are sufficient to cover

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(1) L. R. 10 Ch. 586.

(2) L. R. 17 Eq. 158.

(3) 5 Ch. D. 133.

(4) 6 M. & W. 174.

(5) 9 Ch. D. 623; 13 Ch. D. 268.

(6) 5 Ex. D. 254.

(7) 27 Ch. D. 665.

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a new mode of user the right is not confined to such a description of way as was in use at the time of the grant. Here the defendant does not complain of the level crossing: he admits it is sufficient. The case of *Wimbledon and Putney Commons Conservators v. Dixon* (1) only established that user of a way in one condition of the property does not give a right in an altered condition of the property so as to increase the burden on the servient tenement. Where user gives the right, the right must be limited according to the user. Here, however, the right is not acquired by user, it is conferred by statute. *The Queen v. Brown* (2) was cited in *United Land Company v. Great Eastern Railway Company* (3). It has nothing to say to the present case: there was no question there of accommodation works, the matter in controversy being the amount of compensation. The defendant here makes no complaint as to the accommodation works—he is satisfied with them and merely seeks to use them for the purpose of working his lands. The objections made by the plaintiffs are objections arising entirely from the circumstances of this particular crossing and from defects in the construction of the railway and the accommodation works: they would equally apply to taking two or three ordinary farm carts, or a threshing machine, or to drawing a plough or any other farm implement, as is commonly done, behind a cart, down the slope or over a crossing. If the approach to the crossing be curved, that is the fault of the Company who constructed it: and see section 53, of the Railways Clauses Consolidation Act, 1845. The objection that the crossing cannot be seen from the station signal cabin arises also from the fault of the Company or their predecessors: the latter constructed the railway, and if the signal box does not sufficiently command the crossing the plaintiffs should alter it to meet the necessities of the case. The danger does not arise from the use of the traction engine specially, but from any traffic being allowed over the crossing in question; the traction engine would be seen where a common farm cart could not. If the plaintiffs' evidence is to be relied on, there ought not to be a level crossing at all at the place in question. Possibly the reason why it was originally made there, was that this place

(1) 1 Ch. D. 362.

(2) L. R. 2 Q. B. 630.

(3) L. R. 17 Eq. 158; L. R. 10 Ch. 586.

was in the neighbourhood of the public crossing, and the watchman there had a full view of it. His removal may have rendered the private crossing dangerous, but the defendant is not responsible for that. Section 68 contains a proviso that the Company shall not be required to make the accommodation works in such a manner as would prevent or obstruct the working or using of the railway, but no objection on that ground has been made here: no case has been made of injury to the railway by breaking or shaking the sleepers or rails, nor is there any evidence that a train was ever stopped by a traction engine being on the line, although such engines were constantly passing, up to six years ago, over the public crossing. The law has authorized the use of traction engines, and the defendant is entitled to use the crossing for any lawful traffic, and for every purpose that his land can be reasonably put to.

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[THE VICE-CHANCELLOR: Have any regulations been made as to the use of traction engines? *Meredith, Q.C.*: No; except as to user on public roads.]

The plaintiffs seek to introduce the words "at the time" into section 68 in connection with the words "interruptions to the use of the lands." In reference to the word "lands" *Jessel, M.R.*, in *Newcomen v. Coulson* (1), says (page 142):—"It was said that the grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such restriction. The right is to the owners or owner for the time being of the lands. Now land, according to English law, includes everything on or under the soil; all buildings that you may erect on it; all mines that you may sink under it. If an allottee builds a house, or, as it is said here, twenty-six houses on the land, the owner of each house, with the soil on which it stands, is an owner of part of the lands, and entitled to the benefit of the grant. Irrespectively of the technical meaning of the word 'land,' it could hardly be contended that on the occasion of an inclosure it was contemplated that at no time thereafter would any allottee erect on any part of these large allotments, which I see include

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old inclosures, any labourers' cottages, or any house or dwelling of any kind, or even a stable for his horses. I have no doubt, therefore, that the word 'land' is used advisedly. This being so, it appears to me the right is a general right of way, a right of way to all the houses which may be built on the land in question." Here the meaning of the word "lands" cannot be cut down.

Meredith, Q.C., in reply:—

The defendant's contention practically amounts to this, that notwithstanding section 73, the plaintiffs are now, after a lapse of fifty years, bound to make new accommodation works. For many years prior to 1895 the level crossing was never used for any purpose, and it lies on the defendant to show that he is now entitled to reopen it for a mode of user never before exercised. In all the cases cited on the other side the decisions were on other statutes or private grants or awards, and they afford no safe guide in this case. No case cited for the defendant has really any bearing on section 68, whereas *The Queen v. Brown* (1)—never questioned in subsequent cases, but passed by as not affecting rights under different statutes—is a direct authority on the very section in question here; and the judgments of Cockburn, C.J., and Mellor and Shee, JJ., are based on exactly the same interpretation of that section as that now contended for by the plaintiffs. Robert M'Alister was paid or was entitled to be paid compensation in respect of every prospective user of the lands, and on the basis that he was to have a passage across the railway for ordinary farming purposes. The width of the gates is enough to show that the crossing was intended only for cattle or farm carts. The cases of *Wimbledon and Putney Commons Conservators v. Dixon* (2) and *Cannon v. Villars* (3) show that in order to decide on the extent of a right conferred by user or grant, it is necessary to consider the nature of the user or the circumstances and purposes of the grant; and if it appears that the user or grant was for limited purposes, the right must be limited accordingly. The same principles should apply to the statute here. The decision in *United Land Co. v. Great Eastern Railway Co.* (4) was on a particular Act

(1) L. R. 2 Q. B. 630. (2) 1 Ch. D. 362. (3) 8 Ch. D. 415.

(4) L. R. 17 Eq. 153; L. R. 10 Ch. 586.

of Parliament, the Commissioners *for the time being* were made the Judges of the communications necessary, and there, moreover, the crossings constructed were twenty and thirty feet wide. *Newcomen v. Coulson* (1) was a decision on a particular award. *Norton v. London and North Western Railway Co.* (2) has no application to the present; while *Mayor of New Windsor v. Stovell* (3) depended on the construction of the Public Health Acts, and *Finch v. Great Western Railway Co.* (4) of an inclosure award. There could be an abandonment of the right to use the level crossing, as of any other right of way.

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M^r ALISTER.

THE VICE-CHANCELLOR :—

This is an action by the Great Northern Railway Company against the defendant, to restrain the driving of a traction engine and wagons over a level crossing on the plaintiffs' railway. No attempt is made to interrupt the use of the level crossing for other purposes, it being admitted that the defendant is entitled to the same right of driving carts, &c., over it as he was originally intended to have. The Railway Company institute the action, not only for the purpose of protecting their own interests, but in performance of the duty they owe to the public, to secure the safety of their passengers, and they consider it necessary to apply for an injunction to prevent what directly concerns the public—namely, the recent attempt, by the defendant, to use the level crossing for the purpose of carrying stones from his quarries across the railway by means of a traction engine and wagons.

Feb. 11.

Independently of the peculiar inconveniences which have been deposed to, owing to the position of this particular crossing, it is certainly rather alarming to hear that a level crossing on a railway, without any proper safeguard is used as a passage for driving such a thing as a traction engine across the line. I think there is a very wide difference, in this aspect of the public safety, between ordinary carts drawn by horses, and a traction engine driven by mechanical power, liable to get out of order, and exceedingly heavy and cumbrous, which might be on the line just as a train was coming up, to the danger, possibly

(1) 5 Ch. D. 133.

(3) 27 Ch. D. 665.

(2) 9 Ch. D. 623.

(4) 5 Ex. D. 254.

V.-C. of many passengers. I advert to this, not as a ground for deciding
1897. the case, but as showing the duty which there is on the Railway
GT. NORTHERN. Company to assert their legal rights in the matter.
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M'ALISTER. As to their legal rights, there is no special contract between the parties in this case. The only document shown to exist is the conveyance by Robert M'Alister to the Dublin and Belfast Junction Railway Company. This is simply a grant of the land, and does not contain any reference to a crossing. A crossing was, however, made at the point in question, and as there is no evidence of anything in the nature of a special agreement, the rights of the parties must depend on the Railway Acts.

At the time that the railway was constructed, the lands held by the defendant's predecessor constituted merely an agricultural holding. It became necessary to run the railway through them, and thus to cause an interruption in the user thereof by the defendant's predecessor. Section 68 of the Railways Clauses Consolidation Act, 1845, provides that the Company shall make and maintain for the accommodation of the owners and occupiers of lands adjoining the railway (amongst other works) "such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made."

Where a railway is made through a person's land, there is necessarily an interruption, to a certain extent, of his user of it; and to guard against this inconvenience as far as possible, a remedy was provided by this section, and the Company, in the present case, were bound by its provisions. Accordingly, they constructed a level crossing, 300 yards from Mountpleasant Station, which is that next to Dundalk, one of the most important places on the system. At the point in question the railway runs through a cutting, and there is a slope of 1 in $6\frac{2}{3}$ down from the defendant's land to the railway crossing on one side of it, and a corresponding rise on the other side. From the nature of the ground it certainly could never have been contemplated that the crossing would be used in such a way as that now attempted by the defendant. In addition to that there is this important element—the actual

user at the time. The statute shows that it was the interruption of the existing user which was to be secured against as far as possible. But what is the evidence of user here? Cullen, who has been for seven years in the employment of the Company, and was for eighteen years previously in the service of the defendant, working on this very farm, proved that he never knew the level crossing to be used during that time. The defendant had a more convenient way of carrying the stones—by the public crossing, but at any rate the accommodation crossing was not used. It got into such a state of disrepair as to occasion the cutting of a dyke at the side of the rails, which was there until 1895, and during all the time it was in this state the defendant never thought of setting up a claim to use it as he now seeks to do.

I feel bound by the case of *The Queen v. Brown* (1); but independently of that decision, I think what the statute intended was, that accommodation works should be provided according to the user of the lands at the time, with a period of grace of five years, in case those provided were insufficient. In estimating the compensation to be paid, the future prospects of the land and the interruption therewith may be taken into account, but as to the accommodation works, the user at the time is the matter to be considered. The Court of Queen's Bench so decided, and it is I think plain on the construction of the statute. If the works constructed by the Railway Company are found, within five years, to be insufficient, the landowner may apply for additional works, and a procedure is provided for ascertaining what are required; but at the end of five years there is a total bar. Here no claim was made by the defendant until 1895. I must conclude that this new mode of carrying stones across the railway, by a traction engine and wagons, was not in contemplation when the line of railway was made.

At that time this land was an ordinary agricultural holding, and up to 1895 there was no such user as that now claimed. The defendant intended to work away the entire hillock, which would involve a considerable amount of traffic across the railway, and all this was to be done by a traction engine and wagons. I do not

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(1) L. R. 2 Q. B. 630.

V.-C. think the case comes within the principle of *United Land Com-*
 1897. *pany v. Great Eastern Railway Company* (1). That was a decision
GT. NORTHERN on a special Act of Parliament, which, if construed as contended
RAILWAY CO. for by the defendants, would have prevented the lands being used
v. for the very purpose for which they were acquired. It cannot be
M'ALISTER, a guide in the present case.

I am of opinion in this case that the user now claimed to be exercised is not one ever contemplated, or for which the level crossing was intended, and I shall grant the injunction.

D. M'C. M.

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The defendant appealed (2).

June 26.

Matheson, Q.C., and Dickie, for the appellant.

Campbell, Q.C., Meredith, Q.C., and R. F. Harrison, for the respondents.

LORD ASHBOURNE, C. :—

This is an appeal from an order of the Vice-Chancellor, which raises a new and important question. The Great Northern Railway Company instituted an action against the defendant M'Alister for an injunction to restrain him from drawing a traction engine and waggons on a certain level crossing over the line of the plaintiffs, which had been made as an accommodation way some fifty years ago. M'Alister is the occupier of a farm of 100 acres, and when this portion of the Great Northern Railway was made about fifty years ago, it divided the farm into two divisions. To provide for this separation of the two parts of the farm there was a bridge built of a good description, and there was also a level crossing. These two accommodation works were made with regard to the subject-matter, which was a farm of 100 acres, to keep it in such a way that it could be worked. In order to keep the farm

(1) L. R. 17 Eq. 158; L. R. 10 Ch. 586.

(2) In the Court of Appeal, before LORD ASHBOURNE, C., and FIRZ GIBBON and HOLMES, L. JJ.

in an efficient state these accommodation works were provided, but they were not erected to provide for possibilities of what might afterwards be found on the lands, such as a quarry or a mine. The Vice-Chancellor, after hearing the case, arrived at the conclusion that the Company had made out their case, and that the use sought to be applied by the owner of the farm was one not at all in keeping with the object for which the level crossing was made, and that the proposed user would cause danger to the Company in the lawful use of their property and business. The way the matter arises is this. For nearly fifty years, since the Great Northern Railway Company made their line, until 1895 there never was any question. But then for the first time a traction engine was used by the defendant entirely with a view of working the quarry. This use of the traction engine and its trucks was challenged by the Railway Company, and it was discontinued for a time, but then it was re-commenced. That was again challenged by the Railway Company and they have presented their case reasonably. They were bound by the Act of Parliament to provide the accommodation works; they were bound to erect them in a manner sufficient for any fair use to which they could be put at the time the accommodation works were erected. On that case this traction engine is a perfectly new departure. It is a novel and serious element of danger introduced into their traffic which they were bound at once to look to. It would involve new burdens on the Railway Company. It must prove an element of peril or danger in the management of their traffic and in the working of their line. It was pointed out by Holmes, L.J., at an early stage of the argument that this cannot be treated as an isolated case, but that if it is found that such a level crossing could be turned into a roadway for minerals and other matters, it would be a far-reaching matter, which might involve a vast amount of peril to the public; it might involve a considerable amount of additional expense to the Railway Company, and it might necessitate the employment by the Company of additional servants as signalmen.

These topics were so present to the mind of Mr. Matheson in opening the case that he did not like to found himself on the extreme assertion of what he stated, but suggested that the

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Ashbourne, C.

Appeal. defendant was ready to qualify the injunction in any way, and
 1897. to safeguard the matter so far as he could.
 GT. NORTHN. It was pointed out by the Railway Company that a traction
 RAILWAY Co. engine must involve elements of peril. It is a heavy engine,
 v. M'ALISTER. cumbrous, not easy to move out of the way; and I was much
 Lord struck with the argument, when these topics were under discussion,
 Ashbourne, C. supposing that the Company had their trains late, that they
 infringed on the time that might be marked out as a safe time,
 and if a tremendous collision occurred, what comfort would it be
 to the injured to be told that the whole thing was *bona fide*, and
 that no safeguard could have prevented it, or that the servants
 of M'Alister carried the calculation too far on one occasion, or
 that M'Alister was the person responsible and not the Railway
 Company, if he had not the means of paying damages?

The passage in the Vice-Chancellor's judgment to which Mr. Campbell referred would go to show that an absolute right to use the traction engine was claimed before the Vice-Chancellor. I do not think that the authorities support that contention. We must take the section of the Act of Parliament as the foundation of the grant. But that only gave a right of way, having regard to the rights dealt with, and where a right of way was given for agricultural purposes, that cannot be twisted into a way for mineral traffic. Is it reasonable for the Railway Company to come in here to prevent this crossing being so used? In my opinion it is. The Railway Company are bound to consider, and provide for, the safety of those who travel by their line, and they must decide whether it is a reasonable thing for them, having regard to the safety of the public, to allow this great new engine to be used on level crossings.

I think the Railway Company are right. It is distinctly a new danger, not thought of when the line was made, and I think they were entirely within their rights in asking the Vice-Chancellor for an injunction. The work, in his opinion, was not suitable; it was a matter involving danger to the public. In my opinion the order under review is correct, and the appeal must be dismissed with costs.

FITZ GIBBON, L. J. :—

Though the Railway Company are the plaintiffs, the burden of proof is on the defendant, because he is, in effect, claiming an easement over the property of another, and his position is the same as if the Railway Company had locked the gate against his traction engine, and he had brought an action for obstructing him in the exercise of an alleged right to bring it across the line. The servient tenement is a railway, used as a statutory highway, and more likely to be injured, for the purposes for which the owners are by law entitled to use it, than an ordinary field would be. I base my judgment in favour of the plaintiffs upon two grounds—(1) that the user now claimed would impose a new burden upon the servient tenement which was not contemplated when the easement of the level crossing was granted; and (2) that the defendant cannot cross this particular piece of land (the railway) with an engine which will cause danger to the Company in the lawful use of their own land for its proper purpose. The dominant tenement, when the easement was created, was a farm of 100 acres, and the owner of such a tenement cannot materially increase the burden upon the servient tenement, nor materially alter the user originally authorised, so as to injuriously affect the servient tenement. The origin of the easement is clear; prescription is out of the case, and there is no express grant. The level crossing was an accommodation work erected under the Railway Clauses Act, 1845, s. 68. The owner of the adjoining lands was entitled, when the railway was made, to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway caused by severance in the working of his farm, including, I should say, any alteration or extension of that working which could or ought to have been contemplated by the parties when the accommodation works were made and were accepted. Every physical circumstance may be taken into consideration in determining now what was then in the minds of the parties as to the future user of the crossing. The passage is only some 9 feet wide, and it is approached by a curved road with a very steep gradient. The plaintiff got two accommodation works for his farm; this level crossing, and a bridge. If he proceeded to use the bridge in 1895

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L.J.

for a purpose for which it was not intended, and for which it was not fit—for example, if he sent loads across it which it could not safely bear, he could certainly be prevented from doing so. He seems to me to have no greater right to overtax the level crossing by putting excessive weights or dangerous traffic upon it.

But he fails also upon the other ground, viz. that the easement now claimed is not the easement which was originally granted. The furthest to which the original grant could be carried was, that the defendant got a right to carry his agricultural traffic over this level crossing, and it was, and is, suitable for all such traffic. But it is not suitable for a traction engine drawing stones from a quarry: that is not agricultural traffic, and upon that ground the case is within *Bradburn v. Morris* (1), the authority as to minerals, referred to by Mr. Campbell.

The user which the defendant, as the owner of the dominant tenement, now seeks to make of the railway would reduce the owners of the servient tenement to the alternative, either of working their railway at an increased risk, or of incurring increased expense in continuing to carry on their own lawful business in the same way as they have hitherto done, and the defendant cannot impose either of these alternatives upon them.

The moment Mr. Matheson was obliged to admit that he could not insist upon an unrestricted right to run this engine across the line, but that he must submit to conditions which he asked the Court to define, in my opinion, he showed that the case for the defendant must fail. It would be impossible to define any conditions consistently with the safe and lawful use of the railway as heretofore, and, furthermore, no conditions could be made legally effective. If the Railway Company agreed to them, and if a train was afterwards wrecked by the traction engine, whether with or without breach of the conditions on the part of the defendant, how could the remedies of the injured passengers against the Company be affected? The suggestion of conditions shows that the defendant wants the Company to do what they are not bound to do, or wants the Court to impose upon the Railway Company a responsibility which the Court cannot define or limit, and to which the Company has not hitherto been subject.

HOLMES, L.J. :—

I concur. The right of way to which the defendant is entitled across the plaintiffs' line of railway does not owe its origin to express grant or to prescription. If it were a case of express grant the measure and extent of the right would depend upon the construction of the instrument creating it. If it were a case of prescription, its measure and extent would depend upon the nature of the user. Here it is clear the way originated as an accommodation work provided by the plaintiffs pursuant to the provisions of the statute for the defendant's farm. Accommodation ways of this kind differ very widely in their character, and when they are neither made in obedience to an order of magistrates nor presented by an award, they are the subject of agreement or arrangement between the parties. Presumably this was so in the present case; but the nature of the arrangement can only be known inferentially. We know, however, that the extent of the defendant's right was settled by it once for all, and that although the enjoyment of the right then given may vary with time and circumstances, its legal nature has not been altered by anything that has since occurred.

In the absence of contemporaneous record or evidence, there are three tests which may be applied with the view of ascertaining the defendant's right—First, the purpose for which the accommodation was required; second, the character of the way itself, having regard especially to the fact that it crosses a line of railway; and, third, the mode in which it has been used. Taking these tests in order, we find a farm of about one hundred acres in extent divided into two parts by the railway passing through it. It was necessary that the severed portions should be connected; but what was the object of connecting them, as contemplated by the parties at the time? It was clearly to enable the occupants of the farm, their cattle, and the vehicles used in working it to pass from one part of the lands to another. Nothing beyond the passing of separate carts or wagons, with a horse attached to each, was thought of; and it would not have occurred to anyone to make provision for a systematic traffic in minerals. Accordingly, the way actually provided was such as might be expected, having regard to the needs which it was intended to meet. The way

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approaches the railway in a curve by a steep descent on one side, and, after crossing the line on a level, rises from it by a steep ascent on the other—a fit enough road for an agricultural cart, but it does not require the distinct evidence given at the trial to show that it is most unsuitable for a traction engine with one or two heavily laden wagons behind it. It is probable that traction engines had not been invented at the time the way was made, but I attach little importance to this. The material point is, that the way was unsuited from the first for vehicles of this character, or for the kind of traffic in which traction engines are employed.

Finally, if we look to the mode of user, it was never used at any time except for trifling agricultural purposes, and for more than twenty years before 1895, it seems not to have been used at all—a very remarkable circumstance, when taken in connexion with the fact that the defendant has had a traction engine of his own in constant work for the last eighteen years. Is it not then clear that if the defendant is now permitted to do what he claims, a burden will be imposed upon the servient tenement far in excess of what was arranged for when the accommodation was given and the way made? If there were an accommodation path across a railway line, regarding the origin of which there is no express evidence, but which from its character was manifestly intended for a footpath, and used only as such for fifty years, would it be legally possible to use it as a cattle pass, on its being shown that it was physically possible to do so? It is clear that it would not, and I am of opinion that if the way in this case were, for the future, to be traversed by a traction engine and wagons, it would be as extensive and essential a change in the right originally conferred as the alteration of a footpath into a cattle pass, or of a cattle pass into a carriage road. For these reasons I think that the judgment of the Vice-Chancellor ought to be affirmed.

Solicitors for the plaintiffs: *Crawford & Lockhart.*

Solicitor for the defendant: *Dickie.*

R. D. M.

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H. L.
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Nov. 18.*Acquiescence—Lapse of time.*

APPEAL by the Bank of Ireland from the decision of the Court of Appeal, *ante*, p. 112.

Latham, Q.C., and *Howard Wright* (both of the English Bar) for the appellants.

THE HOUSE OF LORDS (Lords Herschell, Macnaghten, Morris, and Shand), without calling on *Ronan, Q.C.*, and *E. S. Ford* (of the English Bar), for the respondents, dismissed the appeal, with costs (1).

Solicitors for the appellants: *Freshfields & Williams*.

Solicitors for the respondents: *Street, Poynder, & Whatley*.

(1) See W. N. (97), 164 (12); 104 L. T. 82.

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CHARGE ON REAL ESTATE—*Will*—*Charge of legacies on real estate, if personal estate insufficient*—*Subsequent specific devise*—*Acquiescence*—*Lapse of time.*] A testator bequeathed pecuniary legacies to his three daughters, chargeable upon and payable out of his chattel property, money, and effects, and, if the same should be insufficient, charged upon and payable out of his real and personal estates. The testator then devised the lands of *A* (held by him in fee-simple) to his second son, with remainder over to his eldest son in the event of his second son dying under twenty-one or without issue, and devised and bequeathed to his eldest son, *subject as aforesaid*, a brewery with the stock-in-trade belonging thereto, house property, farms, and fee-simple estates (which in fact constituted the residue of his property), and appointed his eldest son residuary legatee, and his wife and two other persons his executrix and executors. By a codicil the testator increased the legacies to his three daughters by further sums, to be subject to the same conditions as the fortunes already left to them. The testator died in 1860, and at that time his personal estate and effects were sufficient to pay his debts and legacies, and one of his daughters, who was married, received

CHARGE ON REAL ESTATE—continued.

her legacy. The other two daughters, who married, were paid interest on their legacies, as well as on portions appointed to them by their father pursuant to his marriage settlement, by his personal representatives, and afterwards by their eldest brother. The second son attained twenty-one, and died intestate and without issue, and thereupon the eldest son succeeded to the lands of *A* in addition to the property devised and bequeathed to him by the testator. The eldest son mortgaged the lands of *A* to *K.*, and afterwards to a bank, making a statutory declaration that all his father's debts and legacies had been paid or satisfied, and died in 1879. By his will he bequeathed the lands of *A* to his two unmarried sisters, freed and discharged from the mortgages created by him, and left the residue of his property to his only daughter, a minor, and appointed his two sisters her guardians. An action was brought in the name of the minor for the administration of the real and personal estate of her father, and a receiver was appointed over the lands of *A* and the other fee-simple lands. In 1884 an order was made fixing the priorities of incumbrances upon the said lands, under which interest was paid to the bank and to *K.* on foot of their mortgages. The sisters made no claim upon the said lands in respect of their legacies, and interest was paid to them by their brother's executor down to 1886. In 1889, one of the unmarried sisters died, having bequeathed all her property to her sister. In 1893, the lands of *A* were sold by leave of the Court under the Land Purchase Acts, and *K.* and the bank were returned as the only incumbrancers. In 1894, the surviving sister filed an objection to the schedule of incumbrances, claiming priority over *K.* and the bank on the ground that the legacies were a subsisting charge on the lands. The proceeds of sale were transferred to the credit of the administration action to abide the order of the Court, and an application was made on behalf of the bank and *K.* for payment out to them of the funds in Court on account of the sums due on foot of their mortgages:—*Held*, by the Court of Appeal, affirming the decision of the Master of the Rolls—(1) that upon the true construction of the will the legacies were charged on the lands of *A*; (2) that in the events which happened the legacies were a subsisting charge on the lands, although at the time of the death of the testator the personal estate of the testator was sufficient to pay them; (3) that there was no laches or acquiescence on the part of the legatees to prevent them asserting their priority. *Richardson v. Morton* (L. R. 13 Eq. 123) dissented from; *Mossy's Estate* (14 Ir. Ch. R. 355) and *Bradford's Estate* ([1895] 1 Ir. R. 251) followed. Judgment affirmed in House of Lords. *McCarthy v. McCartie* [M. R. 86; App. 112; H. L. 609]

CHARGE ON REAL ESTATE—continued.

2. — *Will—Construction*—"All my estate and interest in the lands of *C.*"—*Beneficial interest in charges on the estate passing.*] A testatrix who was entitled to an estate for life in the lands of *C.*, and also to the reversion in fee in the same lands, subject to the determination of the intermediate life estate of *M. P.*, and who was also entitled to a charge of £1000 on the lands absolutely, and to the reversion in two other charges of £2000 each on the lands, subject to the determination of the life estate of *K.* in these charges, by her will devised all her estate and interest in the lands to *G. P.*, to whom also she bequeathed all her plate, plated ware, furniture, and pictures. There was no other legatee mentioned in the will. *Held*, that the beneficial interest in the charges passed under the devise of all the testatrix's estate and interest in the lands. *Kilkelly v. Powell*

[App. 457]

— *Legacy—Marriage of legatee with consent of testatrix—Condition—Time for raising charge* - - - - - 343
See MARRIAGE.

COMPANY — *Debentures* — *Sale in ordinary course of business* - - - - - 488
See DEBENTURES.

— *Insurance—Course of dealing—Estoppel—Lapse of policy* - - - - - 360
See MORTGAGE. 1.

— *Memorandum of association—Alteration of*
See MEMORANDUM OF ASSOCIATION. [435]

— *Railway.*
See RAILWAY COMPANY.

— *Winding-up—Rule in Ex parte Waring* (19 Ves. 345) - - - - - 124, 133, 176
See SECURITIES FOR BILLS OF EXCHANGE. 1, 2.

COMPENSATION—*Specific performance with*
See SPECIFIC PERFORMANCE. [534]

CONDITION—*Will—Marriage with consent of testatrix* - - - - - 343
See MARRIAGE.

CONSENT—*Marriage with sanction of testatrix—Will—Construction* - - - - - 343
See MARRIAGE.

CONSENT FOR JUDGMENT—*Practice—Motion on notice—Costs—Order XL., R. 1, R. S. C. (Ireland), 1891.*] There is no fixed rule in the Chancery Division that judgment by consent must, in all cases, be obtained by motion on notice for judgment. *Pneumatic Tyre Company (Limited) v. Grappler Pneumatic Tyre Company (Limited)*

[M. R. 467]

CONSTRUCTION OF STATUTE—*Land Law (Ireland) Act, 1896, s. 40—Whether mandatory* - - - - - 186, 20
See LAND LAW (IRELAND) ACTS. 1.

- CONTEMPT** — Attachment — Practice, Land Judge - - - - - 316
See ATTACHMENT.
- CONTINGENT LIABILITY**—Land Law (Ireland) Act, 1896, s. 31 (1), (8) - 321
See LAND LAW (IRELAND) ACTS. 7.
- CONVENT**—Devise to Superioress at death of tenant for life - - - - 469
See SUPERIORESS.
- CONVERSION**—*Settlement—Devise.* Marriage articles included a policy of assurance, and declared the trusts upon which the policy was to be held in the usual manner. The ultimate trust, which took effect, was for the husband, his executors, administrators, and assigns. By the same articles, the mother of the intended wife covenanted to devise one-eighth of her lands which were held in fee simple, or a rentcharge, or a gross sum of money equivalent thereto, to the trustees, their heirs, executors, administrators, and assigns, upon trust to invest and re-invest the same if they should so think fit, and to hold the said share upon the same trusts as were declared of the policy, or such of them as should be applicable thereto. The mother subsequently devised one-eighth of the lands to her daughter, and directed the trustees to convey it. This was not done. The husband survived the wife:—*Held*, that there was no conversion of the lands, and that accordingly they passed to the heir-at-law of the wife. *Owen v. Owen and Schomberger* [V.-C. 580]
- COSTS** — *Practice—Appeal—Judgment of Court of first instance directing each party to abide his own costs—Costs of briefs at trial, also used in Court of Appeal.* In an action to set aside certain documents for fraud the plaintiff obtained a decree, but each party was to abide his own costs. The defendant appealed, and the appeal was dismissed with costs. The respondent's bill of costs included four items, which were the costs of briefs of pleading and evidence used in the Court of first instance. The appellant, in his notice of appeal, stated that he intended to rely on the documents contained in these briefs. The Taxing Officer allowed these items as costs of the appeal, and, on application to Madden, J. (sitting for the Land Judge), the ruling of the Taxing Officer was affirmed:—*Held* (reversing the decision of Madden, J.), that the costs of these briefs should not be allowed as costs of the appeal. *Keavans v. Joyce* - - - - - APP. 1
2. — *Against the Crown*—18 & 19 Vict. c. 90, s. 2—*Practice.* Costs cannot be given against the Crown where the Attorney-General is not a party *eo nomine*. *Reg. v. Beadle* (7 E. & B. 492) followed in preference to *Ex parte Jordan* (31 L. R. Ir. 1). *In re Galvin* - - - - - BANKCY. 525
- Judgment—Consent—Motion on notice 467
See CONSENT FOR JUDGMENT.
- COSTS**—*continued.*
— Party chargeable—Taxation - - - 6
See TAXATION OF COSTS.
— Receiver — Bond — Liability of Guarantee Society for costs of orders - 464
See RECEIVER.
- COUNTY COURT**—*Practice—Equity suit transferred from County Court to Lord Chancellor—Further proceedings and practice—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56, s. 37.)* Procedure and practice in equity suits transferred from a County Court to the Lord Chancellor under section 37 of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). *Sheridan v. Sheridan* - - - - V.-C. 474
- COURT LETTING**—Land Law (Ireland) Act, 1896, s. 40 - - - - 186, 265
See LAND LAW (IRELAND) ACTS. 2.
- CROSSING**—Railway - - - - 587, 602
See LEVEL CROSSING.
- CROWN**—Proceedings on behalf of—Costs 525
See COSTS. 2.
- CROWN DEBT**—Priority—Bankruptcy 520
See BANKRUPTCY.
- DEATH**—Of Guarantor—Knowledge of creditor See GUARANTEE. [575]
— Of lessee intestate—Order fixing fair rent—Freehold lease—Devolution of title 295
See LEASE. 1.
- DEATH WITHOUT ISSUE**—*Settlement—Construction—Limitation to one and her heirs, with limitation over in default of her issue.* By settlement made in 1852 *A* conveyed freehold property to trustees upon trust for *A* for life, and after her death, in the event of *B* and *C*, the daughters of *A*, surviving *A*, upon trust for *B* and *C*, as tenants in common, and after the deaths of *B* and *C* upon trust for their issue, as they should appoint, and in default of appointment upon trust for their children share and share alike; and in case of the death of either *B* or *C* in the lifetime of *A*, without leaving issue, then upon trust for the survivor and her heirs and assigns for ever; and in default of issue of either of them, in trust for *D* and *E* (the sons of *A*), their heirs and assigns as tenants in common, and to their heirs for ever. *B* died in the lifetime of *A* unmarried. *C* survived *A*, and died unmarried, having by her will disposed of her portion of the freehold property to her niece *F* for life, with remainder to *F*'s children as she should appoint, and in default of appointment to *F*'s children equally. *C* entered into possession of the property on the death of *A*, and on the death of *C*, *F* entered into possession:—*Held*, that on the death of *C* without issue, the property passed to *D* and *E* as tenants in common in fee-simple. *Morgan v. Morgan* (L. R. 10 Eq. 99) followed. *Arthur v. Walker* - - - - - M. R. 68

DEBENTURES—*Joint Stock Co.—Rights of debenture holders—Sales in the ordinary course of business.*] A distillery Company, registered under the Companies Acts, had, for the purpose of raising capital, issued as a first charge on all the property of the Company debentures, which were secured by a trust deed executed at the time of their issue. By the terms of the debentures and the trust deed the Company was to be at liberty (notwithstanding the charge thereby created) in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with, all or any part of the said property until the principal money thereby secured became payable, but nothing should authorise the creation of any mortgage or charge upon the said property, or any part of it, in priority to the debentures. The Company, being subsequently in want of money to carry on its business, and unable to borrow in consequence of the debentures, it was agreed that a syndicate (representing certain creditors of the Company) should purchase a certain amount of whisky from the Company at a named price, and that the money so paid should be applied, under the direction of the syndicate, in satisfaction of the trade debts and other pressing liabilities of the Company. None of the syndicate, or of the creditors whom they represented, were engaged in the whisky trade:—*Held* (reversing the decision of the Vice-Chancellor), that, having regard to the position in which the Company was placed, the sale was one in the course of business. *In re Old Bushmills Distillery Co.; Ex parte Brett* APP. 488

DECLARATION OF TITLE—*Practice, Land Judge—Tenant for life and remainderman.*] The Court has jurisdiction to entertain a petition by a tenant for life in possession and the remainderman for a declaration of title. *A*, tenant for life in possession, *B*, tenant for life in remainder, and *C* and *D*, tenants in tail in remainder in default of issue of *B* who was unmarried, presented a petition for a declaration of title according to their respective rights. There were no contentious claims to possession. The Court, after argument, made an order on the petition. *In re Kenny's Estate*

[Ross, J., 318]

DEPOSIT RECEIPTS—Notice of withdrawal—Gift of "ready money" in bank—Will—Construction - - - - 324
See MONEY.

DEVASTAVIT—*Executor de son tort* - 513
See EXECUTOR DE SON TORT.

DEVOLUTION OF TITLE—Freehold lease—Order fixing fair rent—Death of lessee intestate - - - - 296
See LEASE. 1.

DIRECTION TO SETTLE—Will—Form of settlement - - - - 170
See SETTLEMENT.

DISMISSAL OF PETITION FOR SALE—Petitioners' incumbrance exceeding value of estate - - - - 540
See LAND LAW (IRELAND) ACTS. 4.

DIVORCE—*A mensa et thoro—Wilful neglect conducing to adultery—Discretionary bar—Exercise of discretion.*] If a husband, by wilful neglect has conducted to his wife's adultery, such conduct on his part constitutes, according to the matrimonial law as now administered in Ireland, a discretionary bar to the granting of a divorce *a mensa et thoro*. Such wilful neglect, when it has conducted to adultery, is not however an absolute bar to relief: it rests in the discretion of the Court. *Scovell v. Scovell* - - - - MAT. 162

DOUBLE INSOLVENCY—Rule in *Ex parte Waring* (19 Ves. 345) 124, 133, 176
See SECURITIES FOR BILLS OF EXCHANGE. 1, 2.

EQUITY CIVIL BILL—Transfer from County Court - - - - 474
See COUNTY COURT.

ESTATE—Sale of part—Land Law (Ireland) Act, 1896, s. 40 - - - - 447
See LAND LAW (IRELAND) ACTS. 3.

—Will—Devise of "all my estate and interest in the lands of *C*"—Beneficial interest of testatrix in charges on the lands held to pass - - - - 457
See CHARGE ON REAL ESTATE. 2.

ESTATE FOR LIFE—Leasehold—Liability of tenant for life for repairs and outgoings—Duty of trustees to insure - - 170
See TENANT FOR LIFE AND REMAINDERMAN.

ESTATE TAIL—Will—Construction—Codicil—*Estate tail or estate for life.*] A testator, who was possessed of four estates, Rathbane, Ballyclough, Keave, and Lisdeen, by his will dated the 2nd September, 1860, devised Rathbane to his grand-nephew *R.* for life, and after his death to his first and other sons in tail male, with remainder to his nephew *H. O.* for life, and after his death to his first and other sons in tail male, with remainder to his brother *J. R.* for life, and after his death to his son *H. T.* for life, and after his death to his first and other sons in tail male, with remainder to *J. F.* (the second son of *H. O.*) for life, and after his death to his first and other sons in tail male, and with remainder to the use of every other son and sons of *J. R.* in tail male, with remainder to the testator's right heirs for ever. Ballyclough the testator devised to *H. O.* for life, and after his death to his first and other sons in tail male, with remainder to *R.* for life, and after his death to his first and other sons in tail male, with remainder to *J. R.* for life, and after his death to *H. T.* (son of *J. R.*) for life, with remainder to his first and other sons in tail male, with remainder to *J. F.* (second

ESTATE TAIL—continued.

son of *J. R.*) for life, with remainder to his first and other sons in tail male; and for default of such issue, to the use of every other son of *J. R.* in tail male, with remainder to the testator's right heirs for ever. Keave and Lisdeen the testator devised to *J. R.* for life, and after his death to *H. T.* for life, with remainder to his first and other sons in tail male, with remainder to *J. F.* for life, with remainder to his first and other sons in tail male; and in default of such issue to the use of every other son of *J. R.* in tail male; and for default of such issue then, as to Keave, to *R.* for life, and after his death to his first and other sons in tail male, with remainder to *H. O.* for life, with remainder to his first and other sons in tail male; and for default of such issue to the testator's right heirs for ever. As to Lisdeen, after the limitations aforesaid, the testator devised that estate to *H. O.* for life, with remainder to his first and other sons in tail male; and in default of such issue to *R.* for life, with remainder to his first and other sons in tail male, with remainder to the testator's right heirs. The testator bequeathed pecuniary legacies to his nieces and two small annuities to servants, and appointed *J. R., R.,* and *H. O.* residuary legatees and devisees, and *J. R.* and *H. O.* executors. After the date of the will *H. O.* had a son born, *H. O.* (junior), and the testator made a codicil to his will dated the 20th February, 1867, by which he revoked the devise of Lisdeen to *J. R.,* and devised that estate, together with Clongheen and Moyarwood, to *H. O.* for life, with remainder to *H. O.* (jun.) for life, and his sons successively in tail male, with remainder to the second and other sons of *H. O.* in tail male; and in default of such issue to the use of *R.* for life, with remainder to his first and other sons in tail male; and in default of such issue to the use of *H. O.* in fee. The testator left his brother *J. R.* £1000, and left the residue of his property to *H. O.* and *R.* equally, as tenants in common, and appointed *H. O.* and *R.* executors of his will and codicil. The testator made a second codicil to his will, dated the 29th May, 1874, by which, after reciting that *H. O.* had died since the execution of his will and first codicil, and that he was desirous that his grand-nephews, *R.* and *H. O.* (junior), the latter on his attaining twenty-one years, should be his executors and residuary legatees, he proceeded as follows:—"Now, therefore, I do hereby appoint the said *R.* and *H. O.* my executors and residuary legatees, in place of my nephew *H. O.,* deceased, as aforesaid. I devise, direct, and declare that all lands, hereditaments, and premises which my grand-nephew, the said *H. O.,* shall take at my death, or be entitled to under any will or codicil made by me, shall be held by him, and to his use in tail male only. And I do hereby declare that my said will

ESTATE TAIL—continued.

and the first codicil thereto shall be construed and take effect throughout as if the names of my said grand-nephews, the said *R.* and *H. O.,* had been inserted in my said will and first codicil thereto instead of the said name of the said *H. O.* deceased. And in all other respects I do confirm my said will and first codicil thereto":—*Held,* by the Master of the Rolls, and by FitzGibbon and Barry, L.JJ. (affirming his decision), *dissentiente* Sir Peter O'Brien, L.C.J., that *H. O.* (junior) took an estate tail in the lands of Ballyclough and Lisdeen. Affirmed by House of Lords. *Rose v. Rose*

[M. R. 9; APP. 22; H. L. 478]

—Absolute estate not cut down to—Limitation over in default of issue—Settlement—Construction - - - - 68
See DEATH WITHOUT ISSUE.

ESTOPPEL—Course of dealing—Insurance company - - - - 360
See MORTGAGE. 1.

EVIDENCE—User—Grant from the Crown
See SEVERAL FISHERY. [140]

EXECUTION—Writ of attachment—Sheriff's fees - - - - 451, 455
See SHERIFF.

EXECUTOR—Will—Trust for legatee—Discretion given to executor as to time and mode of payment—Legatee absolutely entitled.] A testatrix gave to her executors a sum of £1000 in trust for her brother, to be paid in such sum or sums, share or shares, and at such time and manner as they should think proper, and bequeathed the residue of her property to her executors in trust, as to one-half thereof, for her brother in like manner:—*Held,* that the brother was absolutely entitled to the legacy and share of residue, freed from the exercise of any discretion by the executors. *In re Millar, deceased; Clancy v. O'Callaghan* M.R. 290
—National Debt Act, 1870—Re-transfer of stock—Practice - - - - 61

See NATIONAL DEBT ACT, 1870.

EXECUTOR DE SON TORT—Assets—Joint and several liability—Principal and agent—Unauthorized dealing with assets—Necessary payments—Credits.] The liability of one executor *de son tort* for the acts of another executor *de son tort* is not limited to the extent to which there has been an actual personal receipt of goods or money by the first-named wrongful executor; but one executor *de son tort* may be liable for the acts of another when such acts have been authorized and directed by him. Circumstances under which disbursements made in connexion with testator's assets by a wrongful executor have been allowed credit for. *In re Ryan, deceased; Kenny v. Ryan* M. R. 513

FAIR RENT—Order fixing—Lease for life in being—Evolution of tenant's interest

See LEASE. 1.

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FEES—Sheriff—Writ of attachment 451, 455

See SHERIFF.

GUARANTEE—Continuing—Knowledge of guarantor's death—Revocation.] *W.* guaranteed the current account of *W.* and *M.* (a partnership of which *W.* was a member) at a bank by a letter, which provided that the guarantee was to be a continuing one "notwithstanding any changes in the partnership of *W.* and *M.*" *W.* died on the 12th April, 1895. No notice of *W.*'s death was given to the bank. In November, 1895, the bank manager heard in conversation that *W.* was dead. The bank discounted bills for the partnership after the death of *W.* and down to the 31st December, 1895, when the account was closed, and sought to make his estate liable on the guarantee, the firm being insolvent:—*Held*, that knowledge of the guarantor's death was sufficient to put the bank on inquiry whether there was any authority to continue the previous course of dealing, and that the guarantee was determined on the date when the bank first had knowledge of the guarantor's death. *In re Whelan, deceased; Dodd v. Whelan*

[V.-C. 575

GUARDIANS, POOR LAW - - - 272

See POOR LAW.

HUSBAND AND WIFE—Intestates' Estates Act, 1890—Widow—Right to administer real estate - - - 66

See ADMINISTRATION ACTION.

— Legacy to wife—Priority - - - 571

See LEGACY.

— Mortgage of husband's life estate—Postponement and mortgage of pin money—Sale of part of lands charged—Apportionment See MORTGAGE. 1. [360

— Wilful neglect conducing to adultery—Divorce—Discretionary bar to relief 162

See DIVORCE.

INADEQUACY OF PRICE—Report of Land Commission—Jurisdiction of Land Judge See LAND LAW IRELAND ACTS. 5. [426

INQUISITION—Finding existence of several fishery, and that commons of *I.* were in the habit of fishing within its bounds See SEVERAL FISHERY. [140

INSOLVENT ESTATE—Absolute order for sale—Land Law (Ireland) Act, 1896, sect. 40 - - - 186, 200, 540 See LAND LAW (IRELAND) ACTS. 1, 4.

INSTALMENTS—Loan repayable by—Poor Law Guardians - - - 272 See POOR LAW.

INSURANCE—Bequest of leaseholds for life—Duty of trustees to insure - - - 170

See TENANT FOR LIFE AND REMAINDERMAN.

INSURANCE—continued.

— Policy—Lapse—Premiums debited in loan account—Change in course of dealing

See MORTGAGE. 1. [360

INTEREST—Judgment—Statute of limitations See LIMITATIONS, STATUTE OF. [556

ISSUE—Default of—Settlement—Limitation 68 See DEATH WITHOUT ISSUE.

JOINT LIABILITY—Executor *de son tort* 513 See EXECUTOR DE SON TORT.

JUDGMENT—Consent—Motion on notice—Costs - - - 467 See CONSENT FOR JUDGMENT.

— Interest—Arrears—Statute of Limitations See LIMITATIONS, STATUTE OF. [556

— Registration as mortgage - - - 462 See JUDGMENT MORTGAGE.

JUDGMENT MORTGAGE—Absolute order for sale—Trust for sale—Judgment registered after absolute order as mortgage against interest of cestui que trust.] A testator devised lands upon trust for sale and gave one-fifth of the proceeds of sale to *P.* Afterwards an absolute order for sale was made on the petition of the trustee. *C.* obtained a judgment against *P.*, and registered it against *P.*'s estate and interest in the lands. No actual sale had taken place. *Held*, that the registration was effectual to create a charge upon *P.*'s share, and that *C.* was entitled to have the receiver appointed over the lands extended to his claim under the judgment mortgage. *In re Scanlan's Trustees' Estate*

[Ross, J., 462

JURISDICTION, HIGH COURT OF JUSTICE—Register of Trade Marks—Rectification - - - 544 See TRADE MARK.

JURISDICTION, LAND JUDGE—Land Law (Ireland) Act, 1896, s. 40. See LAND LAW (IRELAND) ACTS.

KNOWLEDGE—Of guarantor's death—Continuing guarantee—Revocation - 575 See GUARANTEE.

LACHES - - - 86, 112, 272, 609 See CHARGE ON REAL ESTATE. 1. POOR LAW.

LAND COMMISSION—Report under 40th section of Land Law (Ireland) Act, 1896—Inadequacy of price suggested - 426 See LAND LAW (IRELAND) ACTS. 5.

LANDLAW (IRELAND) ACTS—1896, s. 40—Construction of—Mandatory enactment—Estate over which receiver had been appointed—Absolute order for sale.] 1. In every case where the conditions mentioned in sect. 40, sub-sect. 1, of the Land Law (Ireland) Act, 1896, exist, it is *prima facie* mandatory on the Land Judge to request the Land Commission to make the inspection and report mentioned in sub-clause (a), and afterwards make to the tenants the offer mentioned in sub-clause (b).

LAND LAW (IRELAND) ACTS—continued.

2. But an estate may be so specially circumstanced, e.g. if a sale has become, or, within a reasonable time, may become unnecessary, that it would be reasonable that the Land Judge should put a stay on the making of the request, or forbear from making it, and in such special cases the Land Judge retains a judicial discretion. So held by the Court of Appeal, affirming the decision of Ross, J. (Porter, M.R., and FitzGibbon, L.J., *dissentientibus*). 3. Before sending the request under sub-clause (x) the Land Judge should give an opportunity for its being considered whether the conditions mentioned in sub-clause (a) exist, or whether there are any special circumstances, sufficient to induce him to put a stay on the making of the request, or forbear from making it. *Per* FitzGibbon, L.J.: The Land Judge, in sitting under the Act of 1896, sect. 40, has the same judicial discretion, and ought to exercise it in the same manner, as under the Landed Estates Court Act, 1858, sect. 55. *In re Owen's Trustees' Estate* (No. 1)

[Ross, J., 186; APP. 200]

2. — 1896, s. 40—*Court lettings*.] Tenants holding under lettings from the Land Judge or Receiver Judge are within the provisions of the 40th section of the Land Law (Ireland) Act, 1896, sub-sect. 1. Decision of Ross, J., reversed. *In re Owen's Trustees' Estate* (No. 2)

[Ross, J., 186; APP. 265]

3. — 1896, s. 40—"Estate"—*Part of lands included in absolute order for sale sold after the Act—Jurisdiction to apply 40th section to the remainder*.] The circumstance that part of an estate comprised in an absolute order for sale has been sold to tenants after the passing of the Land Law (Ireland) Act, 1896, does not preclude the Court from putting section 40 into operation with respect to the remainder of the estate. *In re Leonard's Estate; Crisford, Petitioner* - - - - - Ross, J., 447

4. — 1896, s. 40—*Insolvent estate—Petitioners' incumbrance exceeding value of estate—Private proposal of petitioners to purchase—Right of petitioners to dismiss petition*.] Petitioning creditors, whose incumbrance (the first charge) largely exceeded the possible selling value of the estate, brought in a proposal to purchase; and in the alternative applied to discharge the absolute order for sale and to dismiss the petition. Both applications were opposed by a puisne incumbrancer, who was also a tenant in occupation. The 40th section of the Land Act, 1896, admittedly applied:—*Held*, (1) that the proposal could not be entertained without making an offer to the tenants under sect. 40; (2) That, under the special circumstances of the case, the petitioners were entitled to have the petition dismissed. *In re Wemy's Estate; Heath and others, Petitioners*

[Ross, J., 540]

LAND LAW (IRELAND) ACTS—continued.

5. — 1896, s. 40—*Report of Land Commission—Inadequacy of price suggested—Jurisdiction of Land Judge*.] In determining, on the report of the Land Commission, the price at which holdings are to be offered to tenants, under section 40 of the Land Law (Ireland) Act, 1896, the Land Judge will not adopt as adequate sums which a cautious valuator for an intending mortgagee would consider sufficiently secured. Where the Land Judge considers the suggested prices inadequate, he will direct the holdings to be offered to the tenants at increased prices fixed by himself, and if these offers be accepted by the tenants the Land Commission are bound to advance the whole of the purchase-money so fixed, less only the amount (if any) which the tenants are directed to pay in cash. If there are arrears of rent which the Judge requires to be paid by the tenants as a condition of the purchase, the amount of such arrears (to be paid in cash by the tenants) will be added to the purchase-money to be advanced by the Land Commission, and the offer will be made at that aggregate price. Evidence as to value may be given on the consideration of the report. *In re Harkness' Estate; Cox and Co., Petitioners* - - - - - Ross, J., 426

6. — 1896, s. 40—*Scope of section—Agreements for sale to tenants concluded prior to passing of Act—Solvent estate—Negotiations for sale pending*.] Where, previously to the passing of the Act, agreements for sales to tenants have been concluded, the holdings inspected by the Land Commission, and the Land Commission were ready to make the necessary advances, such cases do not come within the scope of the section, and the agreements may be carried out independently of its procedure, even though the estate be insolvent or under a receiver. Where an incumbrancer having carriage of the sale of a solvent estate, over which there was no receiver, had entered into negotiations with tenants for the sale of their holdings, and the agreements were almost completed, the Court declined to transfer the carriage to trustees for sale, with a view of their applying, under sub-sect. (3), to put the 40th section into operation, the application for transfer being opposed by parties beneficially interested in the estate. *In re Murphy's Estate; In re O'Reilly's Trustees' Estate; In re Lynch's Trustees' Estate* - - - - - Ross, J., 186

7. — 1896, s. 31, *subsections* (1), (8)—*Superior interest—Contingent liability*.] The fee-simple of land may be vested in tenant purchasers under section 31 (1) of the Land Law (Ireland) Act, 1896, subject to a contingent liability; as, for instance, where the lands sold are subject in conjunction with others to tithe rentcharge or quit-rent, but adequately indemnified by the latter against liability. *In re Grogan's Trustees' Estates*

[Ross, J., 321]

LAND LAW (IRELAND) ACTS—continued.

8. — 1896, ss. 31, 40—*Superior interest—Rent upon a rent—Redemption—Jurisdiction.*] The Land Judge has power to put the 40th section of the Land Law (Ireland) Act, 1896, into operation with respect to a term of years of the requisite duration, or a sub-fee-farm grant, derived under a superior lease or a fee-farm grant at a rent. The Court has power, under sect. 31, sub-sect. 4, to redeem such superior rent. *In re Daly's Estate, Willens, Petitioner; In re Vyse's Estate* Ross, J., 444

9. — 1896, ss. 31 (1), (8), 40—*Superior interest—Reservation in fee-farm grant of mines and minerals.*] Where an application was made by the party having carriage that a request should issue under the Land Law (Ireland) Act, 1896, sect. 40, and it appeared that the lands were held under a fee-farm grant reserving to the grantor all mines, quarries, royalties, and rights of fishing and fowling, the Court, at the instance of the applicant, requested that the report of the Irish Land Commission should be made on the basis of the continuance of these reservations to the grantor. *In re Herbert's Estate, Herbert, Petitioner; In re Owen's Trustees' Estate* [Ross, J., 476

— 1881, s. 21, 1887, s. 1—Freehold lease—Order fixing fair rent—Devolution of tenant's interest - - - 295
See LEASE. 1.

LANDLORD AND TENANT—Land Law (Ireland) Acts.

See LAND LAW (IRELAND) ACTS.

— Lease.

See LEASE.

— Waste—Manufacture and sale of bricks 381
See MINERALS.

LANDS CLAUSES ACT, 1845—sect. 127—
Superfluous lands - - - 307, 315
See SUPERFLUOUS LANDS.

LAPSE—Policy of insurance - - - 360
See MORTGAGE. 1.

LEASE—*For life in being—Order fixing a fair rent—Status of former lessee—Devolution of tenant's interest—Land Law (Ireland) Acts, 1881 (sect. 21), and 1887 (sect. 1).*] A lessee holding a farm of land under a lease for a life in existence, or for thirty-one years, served an originating notice under sect. 1 of the Land Law (Ireland) Act, 1887, and obtained an order of the Land Commission dated the 29th June, 1888, fixing a fair rent. He died intestate in 1893, during the existence of the life mentioned in the lease:—*Held*, that the lessee had acquired the status of a present tenant by reason of the adjudication of the Land Commission relieving him from the estoppel of his lease and fixing a fair rent on his application, and that his interest in the farm of land, on his death intestate, formed part of his personal estate. *M'Eroy v. M'Eroy* M. R. 295

LEASE—continued.

2. — *Sale of interest in—Rent paid in advance.*] Purchasers bought a lessee's interest in a term of years, the rent for the last year of the term having been paid at the commencement of the letting:—*Held*, that the vendor was not entitled to the year's rent which had been paid in advance, in addition to the purchase-money. *Dublin Corporation v. Barry* - - - V.-C. 65

— Bequest for life—Obligation of tenant for life to repair and pay outgoings - 170
See TENANT FOR LIFE AND REMAINDERMAN.

— Reservation—Minerals—Brick clay 381
See MINERALS.

LEGACY—*To wife—Deficiency of assets—Priority—Intention of testator—Construction of will.*] By his will a testator gave and bequeathed to his wife "the sum of £5000 to be paid to her out of my estate," and he appointed her and another executors. After certain specific devises and bequests, the testator provided as follows:—"Out of the rest, residue, and remainder of my property I give, devise, and bequeath the following legacies," and then followed a number of bequests of money to certain persons. He appointed his wife residuary legatee. In the administration of the personal estate of the deceased by the Court the assets proved insufficient for the payment of all the legacies in full:—*Held*, that the legacy of £5000 to the testator's wife was entitled to priority of payment over the other pecuniary legacies bequeathed by the will. *In re Malone, deceased; Browne v. Malone* - - - M. R. 571

— Charged on land—Condition of marriage with consent of testatrix—Time for raising charge - - - 343
See MARRIAGE.

— Charged on land, if personal estate insufficient [86, 112, 609
See CHARGE ON REAL ESTATE. 1.

— Discretion given to executor as to time and mode of payment - - - 290
See EXECUTOR.

— General or specific—Will—Context 479
See SPECIFIC LEGACY.

— "Ready money in bank"—Deposit receipts
Notice of withdrawal - - - 324
See MONEY.

LEGACY DUTY—Priority—Bankruptcy 520
See BANKRUPTCY.

LEVEL CROSSING—*Accommodation works—Agricultural user of land—Change of condition—Opening quarry—Traction engine—Railways' Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 68, 73.*] A level crossing was, pursuant to section 68 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), made over a railway which intersected lands used as an ordinary farm.

LEVEL CROSSING—*continued.*

The crossing was rarely used, and then only for farming purposes. Many years after the landowner opened a quarry, and sought to draw the stones by means of a traction engine and wagons over the crossing. The engine was nearly as broad as the gates of the crossing, and evidence was given that by reason of the situation of the railway, and the nature of the road approaching to the crossing, the latter was unsuitable for a traction engine, and that the user contemplated would involve danger to passing trains:—*Held*, by the Vice-Chancellor and the Court of Appeal, that the landowner was not entitled to use the crossing in the manner contemplated, and that he should be restrained by injunction from so doing. *Great Northern Railway Co. v. M^r Alister* - - - V.-C. 587; APP. 602
LIEN—Solicitor's - - - 415

See SOLICITOR'S LIEN.

LIMITATIONS, STATUTE OF—3 & 4 Wm. 4,

c. 27, s. 42—*Interest on judgment—Administration of personal estate—Period of limitation.*] The period of limitation applicable to the recovery of interest upon a judgment not registered as a mortgage is regulated by 3 & 4 Wm. 4, c. 27, s. 42, and only six years' interest is recoverable out of the personal estate of the judgment debtor. *Breslin v. Hodgins* I. R. 10 Eq. 260) not followed. *In re Fitzgerald, deceased*; *M^r Donnell v. Fitzgerald* M. R. 556
 — Derelict line of railway—Public user

See SUPERFLUOUS LANDS. [307, 315]

LOAN—Poor Law Guardians—Statutory powers

See POOR LAW. [272]

LUNATIC—Solicitor for committee—Lien 415

See SOLICITOR'S LIEN.

MARRIAGE—*Condition in will—Marriage with consent of testatrix—Legacy charged on real estate—Time for raising charge.*]

A legacy charged on the real estate of a testatrix, conditional on the marriage of the legatee with the sanction of the testatrix, does not fail because the performance of the condition has become impossible by reason of the death of the testatrix before the marriage of the legatee: the condition being applicable only in the event of marriage in the lifetime of the testatrix. A testatrix by her will, made in 1867, pursuant to a power, gave to her sister a life annuity or rent-charge of £75, to be increased to £100 in the event (which happened) of her sister surviving her mother, to whom she had given a life annuity of £75, and if her sister should marry with her sanction and approval, the testatrix charged all her estates with a sum of £2000 for the child or children of such marriage, in such shares as her sister should by deed or will appoint, to be raised off her estates for the said child or children on their attaining age, and not to bear interest during the lives of her mother or sister, or the survivors of them, but to bear interest at five per cent. immediately on the death

MARRIAGE—*continued.*

of her mother or sister, it being her intent that the said charge should not bear interest while the said annuities devised by her should be in force. The testatrix then gave all her freehold and personal property to her husband, and appointed him sole executor and residuary legatee. The testatrix died in 1870, and her husband entered into possession of her real and personal estate. The sister of the testatrix married A in 1872. There were several children of the marriage. The mother of the testatrix died in 1883. In 1895 the sister of the testatrix appointed by deed the said sum of £2000 to her eldest daughter B, who had attained age. B thereupon brought an action against the husband of the testatrix, to have it declared that the sum of £2000 was well charged on the real and personal estate of the testatrix, and to enforce payment thereof by sale or by a receiver. Evidence was given at the trial that the sister of the testatrix had become engaged to be married to A during the lifetime of the testatrix, and that the testatrix had approved of the engagement:—*Held* (1) that, on the construction of the will, and in the event which happened, the sanction and approval of the testatrix was not necessary; (2) that, even if such sanction and approval was necessary, it had been given by the testatrix; (3) that the sum of £2000, though well charged on the real and personal estate of the testatrix, was not raisable until after the death of the surviving annuitant. *Curran v. Corbet*

[M. R. 343]

MEMORANDUM OF ASSOCIATION—*Company—Alteration—Confirmation by Court—Practice*

—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 Vict. c. 62).] Practice, forms of orders, &c., in proceedings for the confirmation of alterations in the memorandum of association of a registered company, under the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62). *In re Marcus Ward & Co.* - - - V.-C. 435

MINERALS—*Reservation of all mines of lead, ore, tin, and other minerals—Ejusdem generis—Brick clay—Manufacture and sale of bricks—Leveling land for building—Waste.*] A lease for lives renewable, made in 1829, and a fee-farm grant, into which it was converted in 1881, reserved all mines of lead, ore, tin, and other minerals, coal, and all quarries of marble, freestone, limestone, and building stones, slates, and other quarries whatsoever (save so much as might be used for building or improvement on the premises), as also all marl, fuller's earth, . . . bogs, turf, mosses, and turbaries. Power was given to the landlord to bore, search for, dig, and carry away bog timber, mines, minerals, marble, coal, freestone, marl, building-stone, limestone and slate, fuller's earth . . . and turf:—*Held*, that brick-clay lying some fifteen inches beneath the surface was included

MINERALS—*continued.*

in the reservation. A sub-grantee, bound by covenant in his sub-grant to build on the premises commenced to cut away the clay, and to manufacture same into bricks, large quantities of which he sold to be used off the premises, alleging that the cutting away and removal of the clay was the proper manner of levelling the land, which was on a hillside, for building. On the assumption that the clay was not included in the reservations in the head lease and grant:—*Held*, to constitute waste, which should be restrained by injunction. *Shaftesbury v. Wallace* - - - - V.-C. 381

— Reservation of mines and minerals to landlord—Sale to tenants—Land Law Ireland Act, 1896, s. 40 - - - - 476

See LAND LAW IRELAND ACTS. 9.

MISREPRESENTATION—Vendor and purchaser—Specific performance with compensation - - - - 534

See SPECIFIC PERFORMANCE.

MONEY — Will — Words — “Ready money in bank” — Deposit receipts — Notice of withdrawal.] A gift of “ready money in bank,” held to include money on deposit receipt, which could be withdrawn without previous notice to the bank; otherwise, if previous notice was necessary. A testatrix, by her will made in 1864, directed that as regards whatever ready money might be found in bank, or interest accruing at the period of her decease, after payment of any just debts, of rent, etc., and the defrayment of a plain, respectable funeral, the surplus should be divided, if worth division, between certain charitable societies. The will contained no residuary bequest. The testatrix died in 1893, intestate as to a large portion of her assets, which included considerable sums on deposit receipts in various banks. She had no current account at any bank. Notice of withdrawal was necessary as regards some of the deposit receipts, but not as regards others. *Held*, that the deposit receipts, as to which no notice of withdrawal was necessary, passed to the charities as “ready money in bank,” but that the deposit receipts as to which notice was necessary were not “ready money,” and being undisposed of went to the next-of-kin. *Mayne v. Mayne* - - - - M. R. 324

MORTGAGE—By husband of life estate in lands — Postponement of pin-money by wife — Sale of life estate in portion of lands discharged from pin-money — No apportionment between sold and unsold lands — Mortgage of pin-money and jointure and policy of life insurance — Premiums debited in loan account — Change in course of dealing — Lapse of policy — Estoppel.] By a settlement on the marriage of *D.* and *M.* lands were vested in trustees, on trust, out of the rents and profits, to raise the annual sum of £300 for *M.* during the joint lives of *D.* and *M.*, subject thereto for *D.* for life, after his death to pay

MORTGAGE—*continued.*

to *M.*, in case she survived him, £500 annually for her life. *D.* incumbered his life estate, and *M.* joined in some of the mortgages and postponed her annuity of £300. The life estate of *D.* in portion of the lands was sold in the Landed Estates Court, discharged from the annuity of £300, and produced more than sufficient to pay the amount then due. By mortgage in 1876 *D.* and *M.* mortgaged to an Insurance Company *D.*’s life estate in the residue of the lands, and also the annuities of £300 and £500, and further, a policy of insurance effected with said Company on the life of *M.*, to secure repayment of £1200 and further advances. A receiver had been appointed over the lands, and under a consent order all rents were paid directly to the Insurance Company, who in a loan account credited such payments and debited the account with the premiums on the policy and interest on same to the month of October, 1890. *D.* died on the 7th of October, 1889, and the receiver was discharged. There was no evidence that the Company gave any notice of their intention to change the course of dealing as to the premiums on the policy. *M.* died on the 29th October, 1891. In an action by the Company to have the arrears of the annuity of £300 declared well charged upon the fee and inheritance of the unsold lands and the arrears of the £500 annuity declared well charged upon the fee and inheritance of all the lands comprised in the said settlement:—*Held*, that the payment of the £300 a-year was not confined to the rents and profits during the life of the tenant for life. *Pepper’s Trusts* (13 L. R. Ir. 108) followed. *Held*, that although the £300 a-year was in the nature of pin-money, the assignees for value of the wife were entitled to resort to the entire amount of arrears, and that the principle of *Howard v. Digby* (2 Cl. & F. 634) did not apply where the wife had parted with her right to the personal enjoyment of the pin-money, or the husband had been deprived of the enjoyment of the estate on which it was charged. *Foss v. Foss* (15 Ir. Ch. Rep. 215) followed:—*Held*, that neither the postponement by *M.* of her annuity of £300 a-year to the mortgages, nor the proceedings in the Landed Estates Court, operated as a release of the annuity or an apportionment of it on the unsold lands. *Held*, that inasmuch as no communication had been made to *M.* of the Company’s intention to treat the policy as lapsed, it would be unfair and inequitable to allow the Company so to treat it. *Tuffnell v. O’Donoghue*

[V.-C. 360

2. — Tenant for life and remainderman — Demise for term of years and grant in fee — Clause preserving powers of tenant for life — Construction of deed—Power, whether released.] A settlement executed on the settlor’s first marriage, under which he was tenant for life, with remainder to his eldest

MORTGAGE—*continued.*

son in fee, gave power to the settlor to create a jointure for any after-taken wife. He joined with his eldest son in mortgaging the settled lands for an advance to the son. The mortgage deed contained two separate witnessing parts. First, a demise for 500 years to a trustee for the lender; secondly, a grant of the lands in fee to the lender. The second testatum was followed by a clause reserving to the father "all the respective powers reserved to him by the settlement," and it was provided that neither principal nor interest should be called in during his lifetime, and that neither his real nor personal estate should be held answerable for the moneys secured. The settlor afterwards married a second time, and exercised the jointuring power:—*Held*, after the settlor's death, that the jointure so created in favour of the second wife took priority over the mortgage. *In re Evan's Estate; Ferguson, Petitioner* Ross, J., 410; *APP. 414*
— Registration of judgment as - - - 462

See JUDGMENT MORTGAGE.

NATIONAL DEBT ACT, 1870—(33 & 34 *Vict. c. 71*)—*Unclaimed dividends—Re-transfer of stock to personal representative of deceased stockholder—Form of order.*] A testator died in 1876 possessed of a sum of consols standing in his name in the books of the Bank of Ireland. The testator appointed four executors, one of whom proved his will, the second and third renounced, and the rights of the fourth were reserved. The executors were ignorant of the existence of the stock, and the dividends thereon not having been claimed, the stock was, in 1886, transferred to the National Debt Commissioners, pursuant to the National Debt Act, 1870. The acting executor died in 1888, and his will was proved by *A* and *B*, his executors. *B* survived *A*, and died in 1893, and his will was proved by *C*, his executor. The executor of the original testator whose rights had been reserved died in 1890 without having applied for probate. *C* having become aware of the existence of the stock, as personal representative of the original testator, applied by petition to the Court for a re-transfer of the stock and payment of the dividends on his undertaking to duly administer the fund. The Court made an order for the transfer of the stock and dividends thereon into Court, the petitioner undertaking to institute proceedings by summons for the administration of the estate of the testator. *In re National Debt Act, 1870; Ex parte Byrne* - - - - - *M. R. 61*

ORDERS, GENERAL—1891, 19th Jan. (Supreme Court), *XI.*, *R. 1* - - - 467

See CONSENT FOR JUDGMENT.

— 1893, July (Supreme Court), *LXV.*, *R. 90*

See SHERIFF. [451, 455]

— Appendix S., Part 4, Items 1 and 6 451, 455

See SHERIFF.

PAYMENT—*Executor de son tort—Credits in administration* - - - - - 513
See EXECUTOR DE SON TORT.

PERPETUITY—*Rule against—Will—Void bequest.*] Testator by his will bequeathed a sum of £2000 to the trustees of the General Assembly of the Presbyterian Church for the erection of a mission hall, and if the trustees of certain premises called the Bethel would sell them, and hand the amount received to trustees for purposes specified in the will, then the testator further devised certain freehold property to said trustees of the General Assembly:—*Held*, that the devise was void for remoteness. *In re Kingham, deceased; Kingham v. Kingham* - - - - - *V.-C. 170*

PERSONA DESIGNATA—Devise to superior—*ess of convent at death of tenant for life*
See SUPERIORESS. [469]

PETITION FOR SALE—Dismissal—Incumbrance exceeding value of estate 540
See LAND LAW (IRELAND) ACTS. 4.

PIN MONEY—Postponement of—Mortgage—Sale of part of lands charged—Apportionment - - - - - 360
See MORTGAGE. 1.

POLICY OF INSURANCE—Premiums debited in loan account—Lapse—Change in course of dealing - - - - - 360
See MORTGAGE. 1.

POOR LAW—*Guardians of the poor—Building of workhouse—Statutory power—Payment of loan—Limitation of time—Power to charge rates generally—Laches—Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), ss. 35, 61–66, 89, 90.*] The Act 1 & 2 *Vict. c. 56*, which provides that money borrowed from a private person on the security of rates and for the purposes as therein provided, shall be repaid by annual instalments of not less than one-twentieth of the sum borrowed, the first of such instalments to be paid at the expiration of one year from the date of the loan on the happening of the conditions mentioned, does not extinguish the debt in a case where there has been no instalment of the principal money paid within the twenty years. The general principle as regards such borrowing statutes is that where there is a statutory power of charging existing and future rates, a direction to pay within a fixed period, or by certain instalments, is directory only and not mandatory; but that when the only charge is upon a rate to be specially made for the purpose, or upon the rates for certain years only, the statutory provision must be strictly followed, otherwise the debt will be lost. In 1851, Guardians of the Poor borrowed money from *A B*, for purposes connected with the building of a workhouse, and by deed executed in that year created a charge for the sum borrowed on the future poor rate, and it provided that this principal sum should be repaid by equal annual

POOR LAW—*continued.*

instalments within twenty years, the first instalment with interest to be paid at the expiration of one year from the date of the deed. The deed of charge provided for interest at the rate of 6 per cent., to be reduced to 5 per cent. on punctual payment. In 1872, *A B* who had advanced the money as trustee for the plaintiffs assigned to them. The Guardians never paid any instalment of the principal money mentioned in the deed, but paid interest up to the 26th June, 1895. Since that date they declined to pay either principal money or interest, except under judgment of the Court:—*Held*, that the non-receipt of any instalment of the principal money, both parties believing it might be held over, did not constitute *laches* on the part of the plaintiffs, and that the sum borrowed and secured by the indenture of charge should be declared well charged on the rates, and that a *mandamus* should issue directing the Guardians to raise the principal sum and interest, and, if necessary, to strike a rate to pay the same.

Hill v. Guardians of Clonmel Union M. R. 272

POWER—Settlement made under—Compound settlement - - - 121
See SETTLED LAND ACTS.

— Whether released—Tenant for life and remainderman—Mortgage - 410, 414
See MORTGAGE. 2.

PRACTICE, CHANCERY DIVISION—Costs

—Appeal—Briefs used at trial - 1
See COSTS. 1.

— Costs—Party chargeable—Taxation - 6
See TAXATION OF COSTS.

— Intestates' Estates Act, 1890—Widow—Right to administer real estate - 66
See ADMINISTRATION ACTION.

— Judgment—Consent - - - 467
See CONSENT FOR JUDGMENT.

— Land Judge—Affidavit of service - 316
See AFFIDAVIT.

— Land Judge—Attachment—Motion on notice - [316
See ATTACHMENT.

— Land Judge—Declaration of title—Tenant for life and remainderman - 318
See DECLARATION OF TITLE.

— Land Judge—Land Law (Ireland) Act, 1896, s. 40

See LAND LAW (IRELAND) ACTS.

— Land Judge—Receiver—Bond—Costs of orders - - - 464
See RECEIVER.

— Memorandum of association—Alteration of—Confirmation by Court - - 435
See MEMORANDUM OF ASSOCIATION.

— National Debt Act, 1870—Re-transfer of stock—Form of order - - - 61

See NATIONAL DEBT ACT, 1870.

PRACTICE, CHANCERY DIVISION—*continued.*

— Proceedings on behalf of Crown—Costs—18 & 19 Vict. c. 90, s. 2 - - 520
See COSTS. 2.

— Settled Land Acts—Compound settlement—Trustees - - - 121
See SETTLED LAND ACTS.

— Sheriff—Fees—Writ of attachment 451, 455
See SHERIFF.

— Transfer of action from County Court—Further proceedings - - - 474
See COUNTY COURT.

PRACTICE, PROBATE AND MATRIMONIAL DIVISION—Resealing letters of administration—Form of certificate - - - 167
See ADMINISTRATION.

PRE-EMPTION—Tenants—Court letting—Land Law (Ireland) Act, 1896, s. 40 [186, 265
See LAND LAW (IRELAND) ACTS. 2.

PRINCIPAL AND SURETY.

See SURETY.

PRIORITY—Crown debt—Legacy duty 520
See BANKRUPTCY.

— Legacy—Construction of will - - 571
See LEGACY.

PROPOSAL TO PURCHASE—Petitioners on foot of incumbrance exceeding value of estate - - - 540
See LAND LAW (IRELAND) ACTS. 4.

PUBLIC HEALTH ACT, 1878—Well—Vesting in sanitary authority - - 420
See PUBLIC WELL.

PUBLIC WELL—Well on private property—Vesting in sanitary authority—*Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 74.*] In an action by a Sanitary Authority, claiming that a well situate on private property was vested in them under section 74 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), the Court was satisfied on the evidence that the well was freely used, without hindrance or interruption, as far back as living memory went; that it was so used principally by the inhabitants of some neighbouring houses, but that such user was not confined to such inhabitants, but was free to all persons who had occasion to resort to the well, and that a path existed during all that time, affording access to the well from a public road. *Held*, that a right in the public to enter and take water from the well could not be supported by prescription, and that it was too wide to be the subject of a custom, and that it could only arise from a dedication to the public by the owners from time immemorial of the land on which the well existed. But, *held*, that it was not necessary for the plaintiffs to establish such dedication, for if they could show that, at the time of

PUBLIC WELL—*continued*.

the passing of the Act, the well was an existing public well, used for the gratuitous supply of water to the inhabitants of the district, it became by the said section vested in the plaintiffs. That to show that the well was then a public well the plaintiffs need not prove that the soil and freehold of the well itself was public property, for if the public had a servitude attached to the soil and freehold, by virtue of which they enjoyed the right of free access to the well to obtain its water for their use, it would be a public well within the meaning of the Act. *Smith v. Archibald* (5 App. Cas. 489) applied, and the well held to be a public well within the Act. *Dungarvan Guardians v. Mansfield*

[V.-C. 420]

PURCHASE OF HOLDING BY TENANT—

Land Law (Ireland) Act, 1896, sect. 40.

See LAND LAW (IRELAND) ACTS.

RAILWAY COMPANY—Abandonment—

Superfluous lands - - - 307, 315

See SUPERFLUOUS LANDS.

—Legacy of Stock—Context of will - 479

See SPECIFIC LEGACY.

—Level crossing—Mode of user—Traction

engine - - - 587, 662

See LEVEL CROSSING.

RATES—Charge on - - - 272

See POOR LAW.

RECEIVER—*Defaulting—Bond—Liability of**guarantors—Costs of orders against receiver.*] The

condition of a receiver's bond was *inter alia* that he should pay and apply as the Court should direct, all such sums of money as should be properly chargeable against him. The receiver made a default in accounting, for which the sureties admitted liability. Orders were made—(a) discharging the receiver; (b) directing him to lodge his balance in Court; (c) appointing a new receiver. The petitioner having carriage was declared entitled to the costs of these orders, but the receiver was not specifically directed to pay them. *Held*, that the sureties were liable for these costs. *In re Greville Nugent's Estate; De la Bedoyère, Petitioner*

[Ross, J., 464]

—Absolute order for sale—Land Law (Ireland)

Act, 1896, s. 40 - - - 186, 200

See LAND LAW (IRELAND) ACTS. 1.

—Court letting—Land Law (Ireland) Act,

1896, s. 40 - - - 186, 265

See LAND LAW (IRELAND) ACTS. 2.

REGISTER—Of Trade Marks—Rectification—

Jurisdiction - - - 544

See TRADE MARK.

RELEASE—Power—Mortgage by tenant for life

and remainderman - - - 410, 414

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REMOTENESS—Devise void for - 170

See PERPETUITY.

RENEWAL—Writ of attachment—Sheriff's

fees - - - 451, 455

See SHERIFF.

RENT—Paid in advance—Sale of lease - 65

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See SPECIFIC PERFORMANCE. [534]

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SECURITIES FOR BILLS OF EXCHANGE—*Company—Winding-up—Bill-holders—Deficient**security—Specific appropriation of title deeds for**payment of bills—Rule in Ex parte Waring.*] Thedecision in *Powles v. Hargreaves* (3 De G. M. & G.430), that the rule in *Ex parte Waring* (19 Ves.

345) extends to a case where the security is in-

sufficient to meet the full amount of the bill, applies

in Ireland. *In re Richview Brick Works Co.**Limited; Ex parte Bailey* - - M. R. 1762. — *Company—Winding-up—Bill-holders—**Double insolvency—Rule in Ex parte Waring.*] Inorder that the rule in *Ex parte Waring* (19 Ves.

345) should apply, both estates must be insolvent,

and both must be under forced or judicial adminis-

tration or liquidation. *In re Belfast Warehouse Co.**Limited; Ex parte Carmichael V.-C. 124; App. 133***SERVICE**—Affidavit of—Practice, Land Judge

See AFFIDAVIT. [316]

SETTLED LAND ACTS—1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1; 1890 (53 & 54 Vict. c. 69), s. 11—*Compound settlement*—*Settlement made in exercise of power in will*—*Appointment of trustees for purposes of Acts.*] Where trustees, for the purposes of the Settled Land Acts, were appointed of a will which empowered the tenant for life to charge the settled land with pin-money, jointure, and portions for younger children, and to create a term of years for that purpose, and the tenant for life afterwards exercised these powers by his marriage settlement, it was *held* that the trustees of the will were not trustees “of the settlement” within the meaning of the Settled Land Acts, and that the will and marriage settlement together constituted a compound settlement, of which trustees should be appointed to enable the tenant for life to exercise the power to raise money by mortgage conferred by the Settled Land Act, 1890, s. 11. *In re Meade’s Settled Estates* M. R. 121

SETTLEMENT—*Will*—*Direction to settle shares of daughters.*] Testator declared that any money to which any daughter should become entitled under his will should be settled free from any liabilities of any other person, and with full power of willing same on her decease:—*Held*, that each daughter’s share should be settled upon her for her separate use, with restraint on anticipation, and with power to dispose of same by will; and in default of such disposition to such daughter’s next-of-kin as if she had died unmarried. *In re Kingham, deceased*; *Kingham v. Kingham* V.-C. 170

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SEVERAL FISHERY—*Tidal river*—*Grant from the Crown*—*Surrender by subject*—*Evidence*—*User*—*Charitable trust*—*Presumption in favour of lawful origin.*] From the finding of an inquisition in 1540 there was clear evidence of the existence, at and prior to that date, of a several fishery in tidal waters, which had been surrendered to the Crown. By subsequent instruments of title this several fishery was identified with that claimed by the plaintiff, who proved documentary title thereto. The evidence satisfied the Court that a several fishery was in fact held and enjoyed in accordance with the documentary title:—*Held*, that the plaintiff had established his right to the several fishery claimed. Prior to a grant in fee to *T.*, a tenant in tail (one of the predecessors in title of the plaintiff), an inquisition was held in 1607. The jurors found (among other things) that *T.* was entitled to a

SEVERAL FISHERY—*continued.*

several fishery (describing it by metes and bounds), and found that the commons of *I.* were in the habit of fishing there:—*Held*, that the two findings must be taken together, and that, as there was no allusion to any title existing in the commons of *I.* to fish in the several fishery found to exist, that the latter finding must be looked on as a statement of fact, to be taken in connexion with other circumstances in the case:—*Held*, also, that the several fishery found to exist in 1607 was not at that time subject to any rights, either of the public or of any specified or defined portion of the public; and that therefore the principle of *Goodman v. The Mayor of Saltash* (7 App. Cas. 633) was inapplicable. *Tighe v. Sinnott* - - - - M. R. 140

SHERIFF—*Fees*—*Writ of attachment*—*Non est inventus*—*Bailiff’s fee and mileage*—*Fee on warrant*—*Renewal of writ*—*Order LXV.*, Rule 90; *Schedule App. S.*, Part 4, Items 1 and 6.] A sheriff is entitled to a fee of 2s. 6d. on the lodgment with him of a writ of attachment for the warrant to be issued upon the writ by the sheriff to the bailiff; and on the writ being renewed the sheriff is entitled to an additional fee of the same amount upon the renewal. Where the sheriff has failed to arrest the person against whom the writ is issued, and has returned the writ *non est inventus*, he is not entitled to the bailiff’s fee and mileage given by the schedule for executing the warrant. *Gibbon v. Buckley* (24 L. R. Ir. 423) and *Ryan v. Richardson* (25 I. L. T. R. 24) followed; *Stevenson v. Moorehead and Wood* (30 I. L. T. R. 139) discussed. *Wren v. Stokes*, - Ross, J., 451; App. 455

SOLICITOR’S LIEN—*Solicitor and client*—*Retaining lien*—*Tenant for life and remainderman*—*Lunatic*—*Committee.*] *A.*, who was a lunatic, so found by inquisition, was tenant for life of certain lands, with remainder to *B.* and to *C.*, as tenants in common in tail. *H.* was employed by the Committee as solicitor in the lunacy matter, and in that capacity obtained custody of the title-deeds. *B.* was subsequently appointed Committee, and continued *H.* as solicitor. In order to pay off a mortgage on the life estate *B.* and *C.* were desirous of creating a charge on the fee, and for that purpose they presented a petition in the lunacy matter, that the Committee might be authorized to join in barring the entail. *H.* acted as solicitor in connexion with the petition, the raising of the loan, and the disentailment of the estate. *Held*, after the death of the lunatic, that *H.* was entitled to a lien on the deeds for these costs against *B.* and *C.*, but was not entitled to a lien against them for any other costs incurred as solicitor for the Committee, save as regarded the taking out of a fee-farm grant, which was not disputed. *In re Stannard’s Trustees’ Estate* - - - - Ross, J., 415

SPECIFIC LEGACY—*Gift of sum of stock in Railway Company—Intention of testator—Context.*]

A testator, after appointing his daughters *M.* and *E.* and another trustees and executors of his will, bequeathed certain pecuniary legacies to the minor children of his deceased son *W.*, subject to the conditions and provisions mentioned, and directed his trustees and executors to invest these legacies in any investments authorized by law for trust funds, or upon the debentures or debenture stock, or guaranteed or preference stock, of any Railway Companies of the United Kingdom, with power to vary, and discretion to apply the income of such investments for the maintenance and education of the legatees. Testator then directed his executors and trustees to invest £200 in any of the securities thereinbefore mentioned, and to pay the income arising therefrom to *C.* for her life, so long as she remained unmarried. It was then put in settlement. He then bequeathed to a grandson, when he should attain the age of twenty-four, the sum of £1000, and directed the executors and trustees to invest the legacy in the investments previously authorized, and to pay the income arising from such investments to the mother of the legatee, for his maintenance and education, till he should attain twenty-four. Testator then bequeathed his gold watch and chain to another grandson. He then gave and bequeathed to his daughter *M.* £1000 debenture stock in the G. S. & W. Railway Company, and £500 in preference stock in the same railway, for her sole use and benefit; and he gave and bequeathed to his daughter *E.* £1000 debenture stock in the G. N. Railway Company, and £500 in preference stock in the same Company, for her sole use and benefit. Testator then made specific devises of particular portions of his real property, and of an annuity of £12 for the life of a relative charged on such estates or moneys as *E.* and *M.* should receive or become entitled to under his will. He directed that the residue of his real and personal estate should be divided into three parts, one-third to be given to *M.*, one-third to *E.*, and one-third to be divided between the children of his deceased son *W.*, and to be paid as therein provided. At the date of the testator's death he was possessed of the exact amounts of debenture and preference stock in the G. S. & W. and G. N. Ry. Companies bequeathed to *E.* and *M.*, except that the sum of preferential stock of the G. S. & W. Railway standing in his name was £600 and not £500:—*Held*, that the legacies to *E.* and *M.* were specific. *In re Doyle, deceased*; *Burke v. Doyle* M. R. 479

SPECIFIC PERFORMANCE—*Vendor and purchaser—Innocent misrepresentation by vendor as to acreage—Purchase-money calculated on acreage represented—Specific performance with abatement in price.*] It is a general principle that where a misrepresentation is made by a vendor as to a matter

SPECIFIC PERFORMANCE—*continued.*

within his knowledge, even though it may be founded upon an honest belief in the truth of what he states, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed so far as the vendor is able to do so, and to have compensation for the deficiency. The plaintiff agreed to purchase land for £5500 on the representation by the defendant that it contained 442 acres, the price being roughly arrived at by multiplying £12 10s. by that number. The area was in fact less by 67 acres. The representation was made in the belief that it was true:—*Held*, that the plaintiff was entitled to specific performance as to the real acreage, with a deduction from the purchase-money in respect of the deficiency, at £12 10s. per acre. The case of *Earl of Durham v. Legard* (34 Beav. 611) must be treated as an exception to the general rule. *Connor v. Potts* - - - V.-C. 534

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| 8 Vict. c. 20—Railways Clauses, ss. 68, 73 | |
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See NATIONAL DEBT ACT, 1870.

SUPERFLUOUS LANDS—*Railway—Abandonment—Derelict line—Statute of Limitations.* Lands were compulsorily taken in 1863 by a Railway Company under their statutory powers for the purpose of constructing a railway through certain private and other quays in Dundalk. The railway was to be complete in 1869, but it was not finished until 1875, when on trial it was found to be defective, and was never used by the public for traffic. A swivel bridge, part of the works, fell into the water, and the rails were allowed to be partly effaced by the traffic on the quays and were partly torn up. After 1875 the Railway Company never made any use whatever of the rails. There was evidence that the public, including the occupiers of the quays, passed over the line as they wished. A tenant of the owner of the lands taken was in the habit of carting coal and salt, in which he dealt, over the rail:—*Held* (1), that the lands occupied by the line had not become superfluous lands within sect. 127 of the Lands Clauses Act, 1845; (2) that no title had been acquired under the Statute of Limitations by the original owner or the occupiers of the quays. *In re Duffy's Estate, M'Evoy, Petitioner* - Ross, J., 307; App. 315

SUPERIOR INTEREST—Sale to tenant—Land Law (Ireland) Act, 1896, s. 31 (1), (8) [321, 444, 476
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SUPERIORESS—*Vendor and purchaser—Will—Devise at death of surviving tenant for life to Superiress of Convent—Period at which Superiress is to be ascertained.* A testator devised her share of freehold lands to her brother and sister equally for life, and on the death of either the whole to the survivor, and directed that on the death of the survivor the share should be divided

SUPERIORESS—continued.

equally between the Superiresses of two convents for the benefit of the schools attached to each. The lands were sold after the death of the survivor. The purchaser required that the person who was Superiress at the date of the death of the testatrix, or her heir-at-law or devisee, should join in the conveyance:—*Held*, that the devise meant the Superiress at the date of the death of the testatrix, and not the Superiress at the date of the surviving tenant for life, and that the requisition of the purchaser should be complied with. *In re Laffan and Downes' Contract*

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TAXATION OF COSTS—*Practice—Party chargeable—Payment—Compromise of law suit—Bill of costs stopped out of fund in hands of a solicitor—12 & 13 Vict. c. 53, s. 3.* A suit having been instituted in the County Court to establish the will of *M.* by *C.* the executor, the widow and daughter of the deceased opposed, with the result that a compromise was effected, by which certain legacies were abated, and the residue of the assets, after payment of the costs of both parties, was to be divided between the widow and daughter. *E.*, the solicitor for the executor, furnished an account to *H.*, the solicitor for the widow, in which he claimed three bills of costs, including one for £52 for untaxed miscellaneous costs. The widow objected, and, on the suggestion of *H.*, *E.* moderated his bill by deducting £5, and sent a cheque to the widow for her share, after deducting the costs. She again objected, and after some correspondence, within twelve months of the delivery of the bill, moved for an order for taxation:—*Held* (reversing the decision of Chatterton, V.-C.), that the widow, as "the person liable to pay," was entitled, under 12 & 13 Vict. c. 53, s. 3, to have the costs taxed. *In re Early* - - App. 6

— Judgment directing each party to abide his own costs—Appeal—Briefs used at trial.
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TENANT FOR LIFE AND REMAINDERMAN—*Liability of tenant for life in occupation of leaseholds for repairs and outgoings—Duty of trustees to keep premises insured.* Testator directed his executors and trustees to allow his wife, if she pleased, to occupy his house during her life, with the use of the furniture, and after her death the same might be sold and the proceeds divided among testator's children:—*Held*, that the widow was liable to pay all headrent and taxes payable in respect of the period during which she occupied the premises, and to keep them in such

TENANT FOR LIFE AND REMAINDER-MAN—continued.

repair as a tenant would be liable for in the absence of express contract; and that it was the duty of the trustees, but not of the widow, to keep the premises sufficiently insured against fire. *Jewne v. Baring* ([1893] 1 Ch. 61) not followed. *In re Kingham, deceased*; *Kingham v. Kingham*

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TRADE MARK—Action for infringement—Jurisdiction of Irish Court—Rectification of register—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 90, 111.] In an action for infringement of trade mark the defendant denied infringement, and pleaded that the alleged mark was not a trade mark, and that the registration was invalid, and counterclaimed that the registration should be set aside, and the register rectified accordingly. By an interlocutory motion the defendant applied for an order that the registration should be set aside and expunged, and the register rectified. The plaintiff opposed the motion on the ground that the High Court of Justice in Ireland had no jurisdiction to order any alteration in the register of trade marks:—*Held*, that the Court in Ireland had no jurisdiction, under the Act of 1883, to order any alteration or rectification of the register of trade marks, which was a special jurisdiction conferred on the High Court of Justice in England. *Bayer v. Connell* - - M. R. 544

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— Legacy—Charged on lands if personal estate should be insufficient—Personal estate sufficient at death of testator but afterwards proving inadequate 86, 112, 609
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THE END.



Placeholder